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Giving the Borrower Time – an Evaluation of the Fitness for Purpose of Section 36 of the Administration of Justice Act 1970¹

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Introduction

This essay provides an analysis of section 36 of the United Kingdom Parliament's Administration of Justice Act 1970. Under this provision if a mortgagee of landed property containing a dwelling house seeks possession of the property, in most cases with a view to sale and realisation of the mortgagee's security, the court may suspend the possession order or otherwise adjourn the proceedings to give the mortgagor time to pay off arrears and otherwise get back on track in terms of paying the mortgage. In the context of this essay 'mortgagee' effectively means 'lender' and 'mortgagor' means 'borrower'. Unless the context specifically states otherwise these terms are used inter-changeably.

The essay begins by describing the contemporary context in which section 36 operates today. This is with a view to clarifying the legal and social challenges section 36 has to address. It will then proceed to explain the legal position before section 36 was enacted and the law on to which section 36 was effectively grafted. The main body of the essay which follows on from these introductory sections will examine three principal issues pertaining to section 36 today. First, there is the question of whether the mortgagee should be required as a matter of law to get a court order before realising its security. Although mortgagees almost invariably do for reasons which will be explained the current legal position is that they are not obliged to do so. Secondly, the essay addresses the question of the approach that should be taken to giving the mortgagor time to clear arrears and get back on track. In essence the question to be asked here is how should the legal regime balance the interests of both parties? Thirdly, the essay will discuss those cases where it is recognised that the mortgagor is not going to be able to get back on track and there is really no alternative but to sell the property. The specific question here is whether the mortgagee or the mortgagor should have carriage of the sale. In relation to the first question the jurisdiction in which the author resides (Northern Ireland) has legislative provisions allowing for a significantly different approach in some cases to that which is taken in England and Wales; and in relation to the third question Northern Ireland has been more willing to allow the mortgagor to have carriage of the sale. Comment will be offered at the appropriate time as to what may be learned from these distinctive Northern Irish approaches. However, as the remainder of this introduction will make clear the social context in which section 36 operates today is very different from 1970 and this presents issues as to whether the section is in need of significant reform. The legal context is also very different from the 1970s. Section 3 of the Human Rights Act 1998 requires legislation to be read compatibly with the European Convention on Human Rights so far as this is possible or declared incompatible under section 4 if it cannot. Various soft law provisions were drafted

¹ The author expresses his gratitude to Charles O'Neill, legal adviser to the Northern Ireland Co-ownership Housing Association for the considerable help received from him in the preparation of this essay. Thanks are also expressed to participants in the Remedies Discussion Forum at Universite de Paris-Dauphine on 16/17 June 2015, and also at the inaugural Haifa workshop held at Queen's University Belfast on 11-13 November 2016. The author alone is responsible for any errors in the text.

in the 2000s and the impact of these must be considered too. The new hard law and soft law provisions will be considered in relation to the second issue outlined above.

The overarching question which this essay addresses is whether section 36 is still 'fit for purpose', and if it is not, what a new legislative provision replacing it should contain.

The Need for a Contractual Corrective

Where a lender supplies funds to enable a borrower to purchase a home there has to be a remedy for the lender in the event that the borrower defaults in the repayment of that loan. The usual way in which the loan is provided is by way of mortgage. The mortgage enables the lender to sell the property and recoup the loan in the event that the borrower makes default in repayment. Contractual terms and conditions often specify in greater detail what sort of default would enable the lender to enforce its rights under the transaction.

Two features of these contracts require a specially adapted remedial regime different from that which the ordinary law of contract would provide. First, mortgage contracts typically last for a considerable period of time, often 25 years or more. It is unrealistic to expect that over a period as long everything will go according to plan and that the borrower will never experience significant difficulty in meeting his or her financial responsibilities. To treat a mortgage contract like another commercial contract where the vicissitudes of life are treated as allocated risks and the consequences of default accepted philosophically is unsatisfactory because of the second feature of these contracts. The second feature is that these contracts are designed to enable the borrower to purchase a *home*. A *home* is not just the bricks and mortar that go into the physical structure. It is a place where someone lives, where a large part of their identity lies, and where their spouse or partner and their children (if they have any) live too.² Loss of home has been identified as a significant mental health issue.³ Encouraging home ownership has been United Kingdom government policy for several decades.⁴ To some extent this encouragement has come via the absence of alternative accommodation through social housing.⁵ If lenders too readily repossessed mortgaged property this could significantly increase the numbers of people needing social housing and also cause homelessness.⁶ The exercise of a lender's enforcement rights is often wasteful. Although lenders when selling repossessed property owe a common law duty to obtain the

² See the magisterial study by Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart Publishing, 2006).

³ S. Nettleton, 'Losing Homes Through Mortgage Possession: a 'New' Public Health Issue' (1998) 8 *Critical Public Health* 47; S. Nettleton and R. Burrows, 'When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England' (2000) 15 *Housing Studies* 463.

⁴ *Houses: the Next Step*, Cmnd 8996 (London, HMSO, 1953); *House Purchase*, Cmnd 571, Sessional Papers (London, HMSO, 1958); *Fair Deal for Housing*, Cmnd 6581 (London, HMSO, 1971); *Our Future Homes*, Cm 2901 (London, HMSO, 1995); *Extending Home Ownership for All* (London, HMSO, 2005); *Sustainable Communities: Homes for All (A Five Year Plan from the Office of the Deputy Prime Minister)* (Norwich, HMSO, 2005).

⁵ See Nettleton *supra* n. 3 at 49; S. Wilcox, J. Perry and P. Williams, *UK Housing Review: 2015 Briefing Paper* (Coventry, Chartered Institute of Housing, 2015), p. 12.

⁶ See Wilcox, Perry and Williams *ibid*, at p. 13.

best price reasonably obtainable,⁷ it is well known that repossession sales often realise much less than the maximum possible.⁸

The Contemporary Context

Enough has been said to establish that some sort of corrective to a strict contractual regime is necessary. Now the salient features of the contemporary housing market in the United Kingdom today that the contractual corrective needs to address will be set out.

Owner occupation has increased significantly in Britain since the Thatcher government came to power in 1979⁹ and house prices have risen very considerably over the same period. A number of factors have contributed to this. As stated above government policy has been to encourage home ownership and social housing as an alternative to owner occupation has not been available to the extent it was before.¹⁰ Restrictions on the provision of credit were relaxed by the Financial Services Act 1986 and in the 2000s lenders made considerable amounts of credit available to consumers without rigorously checking whether it was affordable.¹¹ As Professor Susan Smith has pointed out many people found that the value of their home increased faster than their income and many shared the perception that housing was a much safer investment than the 'volatile' Stock Market. A house became not just a place to live but an investment and sometimes houses were purchased purely as investments, for example buy-to-let properties.¹² Wilcox, Perry and Williams¹³ referred to figures showing that since 2003 the value of household wealth grew at a faster rate (64%) than either gross household disposable income (44%) or consumer price inflation (30%). Half of all households in England and Wales had net property wealth of £150,000 or more. This did not make people as wealthy as these figures suggested because they did not indicate how much householders

⁷ *Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949; *Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 4 All ER 484.

⁸ The Housing Repossession Taskforce in Northern Ireland estimated that repossessed properties sold between 2008 and 2013 only achieved about 42% of their true market value. See Department for Social Development, *Housing Repossessions Taskforce Final Report* (Belfast, 2015), para 41. A wave of repossession sales in a neighbourhood often causes contagion – see A. Mian and A. Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It From Happening Again* (London, University of Chicago Press, 2014), referred to in *Housing Repossessions Taskforce Report* at para 43.

⁹ See D. Mullins and A. Murie, *Housing Policy in the United Kingdom* (London, Palgrave MacMillan, 2006). Owner occupation increased from 55% in 1979 (p. 36) to 69.4% in 2001 (p. 49). Sarah Nield pointed out that shortly before the credit crunch owner occupation in Britain reached 70% and the government had expressed the hope it would rise to 75%. See S. Nield, 'Responsible Lending and Borrowing: Where to Low-Cost Home Ownership' (2010) *Legal Studies* 610, at 618, referring to HM Treasury, *Government's Response to Kate Barker's Review of Housing Supply* (2005).

¹⁰ Social housing has declined as a percentage of total housing stock over this period. In 1979 it stood at 32% of United Kingdom housing stock, declining to 21% in 2001. See Mullins and Murie, *ibid*, at 36 and 49. 'Right to buy' schemes, under which public sector tenants could purchase their houses at a price discounted to reflect the rent they had already paid, had a significant part to play in this. See Nield, *ibid*, quoting statistics from the Office for National Statistics indicating that by 2002 over 2 million public sector tenants gained access to home ownership through the Right to Buy Scheme.

¹¹ See Nield, *supra* n.9; Housing Repossession Taskforce, *supra* n. 8, at para 26.

¹² S.J. Smith, *Banking on Housing? Speculating on the Role and Relevance of Housing Wealth in Britain* (Project Report, Durham University, Durham, 2005); Susan J. Smith, 'Owner-occupation: at Home With a Hybrid of Money and Materials' (2008) 40 *Environmental and Planning A* 520; S.J. Smith, B.A. Searle and N. Cook, 'Rethinking the Risks of Home Ownership' (2009) *Journal of Social Policy* 83.

¹³ *UK Housing Review*, *supra* n. 5, at p. 7.

owed on their mortgage. It would seem that to some extent the increase in house prices and the willingness of people to invest in housing fed off each other.

The increase in house prices has obvious implications for affordability, which is an obvious issue for section 36. Since 1979 (when the Thatcher government came to power) there has been a substantial increase in the number of houses purchased on mortgage by members of lower income groups.¹⁴ Often the loan to value (LTV) and loan to income (LTI) ratios of these mortgages are very high.¹⁵ Wilcox, Perry and Williams found that between 2001/02 and 2008/09 the number of 'highly geared' households (those spending more than a third of their net income on housing) more than doubled and some 1.6 million households were in 'debt peril' (spending more than a half of their net income on housing).¹⁶ Matthew Whittaker has pointed out that these figures could rise substantially were interest rates to rise over the next few years.¹⁷ Affordability problems go a long way towards explaining the problem of mortgage arrears in the United Kingdom. Professor Nield, relying on statistics provided by the Council of Mortgage Lenders, stated that in the first six months of 2009 there were 24,100 repossessions in the United Kingdom, 205,600 mortgages were in arrears of 2.5% or more, and over 270,000 mortgages were in arrears by three months or more.¹⁸ Various structural factors including more flexible labour markets with accompanying increases in part-time working and short term contracts,¹⁹ increasing levels of relationship breakdown and more volatile global economic conditions²⁰ have also played their part. It is easy to blame much of this problem on irresponsible lending by lenders who relied on the apparently inexorable rise in the value of property but account should also be taken of the increased costs that more rigorous assessment of borrowers' ability to pay would involve and the borrowers' reluctance to undergo intrusive affordability checks.²¹ The bottom line was that if affordability had been tested more thoroughly, then in the absence of viable alternatives, many people would have been unable to put a roof over their heads.²²

In concluding this section on the contemporary context it is important to recall that after the boom in house prices that preceded the financial crisis came a significant fall in house prices throughout the United Kingdom and a massive crash in Northern Ireland.²³ Accompanying the fall in house prices there was inevitably a negative equity problem, where the value of the property is below the amount owed on the mortgage. Negative equity has given rise to the phenomenon of the 'mortgage prisoner' who is so heavily in debt that they cannot refinance their mortgage or downsize because they can put down no deposit and would remain liable to pay the loan taken out to purchase the property they sell. Ministry of Justice Statistics for

¹⁴ See Nettleton, *supra* n. 3, at p. 49; Nield, *supra* n. 9, at 618.

¹⁵ See Nield, *ibid*, at 622.

¹⁶ *Supra* n. 5, at p. 7. This problem is particularly severe in Northern Ireland; see Behavioural Insights Team, *Applying Behavioural Insights to Encourage Earlier Engagement from Borrowers in Mortgage Arrears* (Belfast, 2015), pp. 10-11.

¹⁷ M. Whittaker, *Mortgaged Future: Modelling Household Debt Affordability and Access to Re-Financing as Interest Rates Rise* (London, Resolution Foundation, 2014).

¹⁸ Nield, *supra* n. 9, at 622.

¹⁹ Nettleton, *supra* n. 3, at 50.

²⁰ Nettleton and Burrows, *supra* n. 3, at 465.

²¹ Nield, *supra* n. 9, at 623.

²² *Ibid*, at 631.

²³ The Housing Repossessions Taskforce pointed out that house prices remain nearly 50% below their peak in 2007; *supra* n. 8, at para 32.

the first quarter of 2015 reveal a significant drop in the number of mortgagee repossessions and applications for possession orders since 2008. This is attributed to lower interest rates, a proactive approach from lenders in managing consumers in financial difficulties, government initiatives like the Mortgage Rescue Scheme and the Mortgage Pre-Action Protocol.²⁴ The Mortgage Repossession Taskforce also referred to a higher degree of tolerance of arrears by lenders than in previous recessions.²⁵ It seems likely that the recent attitude of lenders is simply a realistic appreciation that repossession will just lead to sale at a 'knock down' price with very little prospect of recovering the outstanding debt from a stretched borrower.²⁶

The Genesis of Section 36

This section of the essay traces the development of the contractual corrective referred to above from the common law to section 36 of the Administration of Justice Act 1970 as amended by section 8 of the Administration of Justice Act 1973.

The mortgagee's right to possession at common law

Before home ownership became popular in the twentieth century most mortgages were granted over property in which the borrower already owned an estate or interest. The loan may have been for the development of the land, or to finance a commercial project or to relieve the borrower's need for ready money for whatever reason; the loan was not usually extended to enable the borrower to acquire that property. Unless the mortgage contract specifically provided that the mortgagee was only entitled to go into possession of the property in certain circumstances, he or she was entitled to go into possession immediately and without demonstrating any default on the part of the mortgagor. As Harman J memorably expressed it in *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* the mortgagee may go into possession "before the ink is dry on the mortgage."²⁷ The exercise of this inherent right to possession, described by Lara McMurry as "a relic of sixteenth century jurisprudence,"²⁸ otherwise than as a preliminary to exercising the power of sale below, was not something that mortgagees were normally inclined to do because they were subject to duties to account for rents and profits received from the land and a potential liability for waste.²⁹ The modern law of mortgages for the acquisition of residential property is a graft upon this ancient law of mortgage.³⁰ In most of these residential mortgages it is specifically

²⁴ www.gov.uk/government/collections/mortgage-and-landlord possession statistics. Statistics released by the Council of Mortgage Lenders show this trend continuing in the second quarter. Some 72% of repossessions were owner-occupied properties and the remainder buy-to-let. The number of borrowers in arrears of more than 2.5% of the balance owing was at its lowest since the industry's quarterly data series began in 2008. See Daily Telegraph, 14th August 2015, p. 33.

²⁵ *Supra* n. 8, at para 33.

²⁶ Non-recourse mortgages are not a significant feature of the mortgage market in the United Kingdom.

²⁷ [1957] 1 Ch 317, at 320. This was underlined by the same judge in *Alliance Permanent Building Society v Belrum Investment Ltd* [1957] 1 All ER 635, at 636.

²⁸ L. McMurry, 'The Section 36 Discretion: Policy and Practicality' (2002) *Conv.* 594.

²⁹ This was explained by Goff LJ in his judgment in *Western Bank Ltd v Schindler* [1977] 1 Ch 1, at 20-26.

³⁰ See L. Whitehouse, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform', in S. Bright (ed), *Modern Studies in Property Law* (vol. 6, Hart Publishing, 2011), 151.

provided that the mortgagee may enter into possession only where the mortgagor defaults. Section 36 may then become relevant in terms of giving the mortgagor time to remedy the default and thus prevent the mortgagee from entering into possession.

The mortgagee's power of sale

To realise its security the mortgagee needs to sell the property and to do this has to show default by the mortgagor.³¹ Since purchasers would be unlikely to pay any satisfactory price for an occupied property a selling mortgagee would almost invariably first seek vacant possession of the property. Section 36 only permits the court to suspend a possession order or otherwise adjourn possession proceedings, and does not in terms bar the sale of a mortgaged property. But the practical need to obtain possession would generally ensure that the court could give the mortgagor time to prevent his or her home from being sold by remedying the default. The further implications of the mortgagee not being required as a matter of law to obtain possession before selling the property will be discussed below.

The origins of section 36

When home ownership financed by building society mortgages began to increase in popularity between the First and Second World Wars there was a growing belief that the traditional mortgage did not provide borrowers with sufficient protection in the event that they experienced temporary financial difficulties. Paying off a mortgage takes a long time and much can change in the borrower's circumstances over the life of a mortgage. Illness, unemployment, marital or relationship breakdown, and the birth of children can all affect the borrower's ability to pay. Sometimes these problems can be permanent and intractable and there may be no alternative but to accept that the house purchase project has sadly failed and that repossession by the lender is the only option. However, on other occasions there may be good grounds for believing that if the borrower were given a temporary reprieve from the consequences of default that he or she could get back on track. Sale of the mortgaged property did not always result in payments made by the borrower being wasted as, once the lender recouped what was owing to it, any surplus would be paid to the borrower.

In what seems like a response to the above, a new procedure for obtaining a possession order was introduced in 1936 by way of amendment to the Rules of the Supreme Court.³² This provided that a lender seeking a possession order was required to take out an originating summons in the Chancery Division of the High Court and that the court could not make a possession order in the absence of the borrower. The purpose was to ensure that any defence which the borrower might have would be brought before the court and that the previous practice of allowing possession orders to be granted in the absence of the borrower would be prohibited. Order 55 r. 5A was supplemented by a Practice Direction which provided that if the Master thought "that the defendant ought to be given an opportunity to pay off the arrears, the Master may adjourn the summons on such terms as he thinks fit." This was liberally applied by the Masters of the Chancery Division with the effect that borrowers were given extensive opportunities to clear arrears and get back on the original track. However in

³¹ Law of Property Act 1925 section 103 (England and Wales), Conveyancing Act 1881 section 19 (Northern Ireland).

³² RSC Ord 55, r. 5A.

*Birmingham Citizens Permanent Building Society v Caunt*³³ Russell J held that the Rules Committee had no power by way of Practice Direction to abrogate the common law rule that the mortgagee was entitled to go into possession without default unless the mortgage contract provided otherwise. The only restriction provision otherwise under the contract in *Caunt* was so long as the mortgagor kept paying the mortgage instalments. It had been argued that as the mortgage provided for repayment by instalments that the 'before the ink is dry on the mortgage' rule did not apply but the judge rejected this argument. The court had power to adjourn the possession proceedings but only for a short period of about 28 days to enable the mortgagor to raise the funds, probably by sale of the mortgaged property, to pay off the entire mortgage. Notwithstanding the claim that there existed a wider equity to keep the mortgagee out of possession,³⁴ *Caunt* was generally accepted as an accurate statement of the law. Protection for the mortgagor in default had to come through legislative reform.

Legislative reform came through section 36 of the Administration of Justice Act 1970, which followed from the recommendations of the Payne Report.³⁵ The largest part of this Report was concerned with the recovery of debts and the enforcement of money judgments but consideration of the powers of the court on mortgagee repossession actions was included in the terms of reference. The Report recommended that the powers purportedly exercised by Chancery Masters under the 1936 Practice Direction should be placed on a statutory footing, and that house purchasers paying off a mortgage should have similar security of tenure to that possessed by many tenants under various statutory schemes.³⁶ As Lara McMurtry has explained "[t]his change was geared to minimise any undue hardship experienced by a mortgagor in *transient* financial difficulties."³⁷ The Payne Committee seems not to have considered problems like affordability and negative equity described above. No prescribed period of suspension or adjournment was recommended but it was anticipated that six months would be the normal case.³⁸ It was also stressed that the mortgagee's security should not be imperilled.³⁹

Section 36

Section 36 is in the following terms:-

³³ [1962] 1 Ch 883.

³⁴ See M. Haley, 'Mortgage Default: Possession, Relief and Judicial Discretion' (1997) 17 *Legal Studies* 483, at 488 where this view is explained.

³⁵ *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd 3909, HMSO, 1969). The proposals on mortgagee repossessions were the only part of this Report to become law. Interestingly similarly comprehensive reform recommendations concerning enforcement of judgments made by the Anderson Report in Northern Ireland did result in legislative reform through the Judgments (Enforcement) Act (NI) 1969, now the Judgments (Enforcement) (NI) Order 1981.

³⁶ *Ibid*, para 1386(d).

³⁷ L. McMurtry, 'Mortgage Default and Repossession: Procedure and Policy in the Post-Norgan Era' (2007) 58 *NILQ* 194, at 197 (emphasis added), citing the Payne Report *ibid* at 1386(b), where it states: "Any man's income or earnings can fall suddenly through no fault of his own, and he should be able to look to the court for any protection he may need against onerous claims arising out of the change of his means and circumstances."

³⁸ *Ibid*, at 1388.

³⁹ *Ibid*, at 1386(d).

- “(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
- (2) The court----
- (a) may adjourn the proceedings, or
 - (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may----
 - (i) stay or suspend execution of the judgment or order, or
 - (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.
- (3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.
- (4) The court may from time to time vary or revoke any condition imposed by virtue of this section.
- (5)⁴⁰
- (6) In the application of this section to Northern Ireland, “the court” means a judge of the High Court in Northern Ireland, and in subsection (1) the words from “not being” to “made” shall be omitted.”

Some preliminary points should be made about this provision before concluding this section. The essence of section 36 is that the borrower may be given time to remedy the default provided he or she can do so within a reasonable time. This caused difficulty in *Halifax Building Society v Clark*⁴¹ because the instalment mortgage in that case made the entire outstanding mortgage money payable immediately upon the failure to pay any instalment on time. As the mortgagor could not pay this sum in the near future (s)he could not remedy the default within a reasonable time and so Pennycuik V-C held that a possession order would have to issue. Although doubts were expressed about this decision by the Court of Appeal in *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham*⁴² Parliament amended section 36 by section 8 of the Administration of Justice Act 1973:-

- “(1) Where by a mortgage of land which consists of or includes a dwelling-house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in

⁴⁰ Repealed by Statute Law (Repeals) Act 2004, s.1(1) & Sch. 1 Pt 12.

⁴¹ [1973] 1 Ch 307.

⁴² (1974) 28 P & CR 69.

part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

- (2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection(1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment.
- (3) Where subsection (1) above would apply to an action in which a mortgagee only claimed possession of the mortgaged property, and the mortgagee brings an action for foreclosure (with or without also claiming possession of the property), then section 36 of the Administration of Justice Act 1970 together with subsections (1) and (2) above shall apply as they would apply if it were an action in which the mortgagee only claimed possession of the mortgaged property, except that----
 - (a) section 36(2)(b) shall apply only to any claim for possession; and
 - (b) section 36(5) shall not apply.
- (4) For purposes of this section the expressions “dwelling-house”, “mortgage”, “mortgagee” and “mortgagor” shall be construed in the same way as for the purposes of Part IV of the Administration of Justice Act 1970.
- (5)⁴³
- (6) In the application of this section to Northern Ireland, subsection (3) shall be omitted.”

Section 8 has had the following important effects. First, it rectified the problem identified in *Halifax Building Society v Clark* above, by providing through section 8(1) that it was only the arrears that had to be paid within a reasonable time and not the entire mortgage debt. Secondly, it must be clear that the mortgagor can carry on making the ordinary mortgage payments when the arrears have been cleared.⁴⁴ Thirdly, if the mortgage is in traditional form and requires repayment within a short period like six months but there is also provision for

⁴³ Repealed by Statute Law (Repeals) Act 2004 s.1(1) & Sch 1 Pt 12.

⁴⁴ As Griffiths LJ put it in *Bank of Scotland v Grimes* [1985] 2 All ER 254, at 259: “Therefore the relief which is given by the 1973 Act is that if the court is satisfied that the householder is in a position to bring the books up to date, that is to pay all the sums that he should have paid up to the present time, including capital and interest, some relief can be given, providing, of course, it looks likely that he will be able to put his house in order and continue to pay in the future.”

indefinite payment of interest, it should be given a reasonably liberal interpretation so that the mortgagor is treated as permitted to defer payment of capital within the meaning of subsection (1) above.⁴⁵ Fourthly, section 8(3) prevents the mortgagee from avoiding application of the court's powers to suspend or adjourn by foreclosing on the mortgage.⁴⁶ Fifthly, it brings endowment mortgages within the protection provided by section 36. Under an endowment mortgage the mortgagor pays interest for the duration of the mortgage and premiums into a separate endowment policy. Once all the premiums have been paid the mortgagor becomes liable to pay off the capital advanced under the mortgage, using the proceeds of the endowment policy to do so. In *Western Bank Ltd v Schindler*,⁴⁷ a case decided one day before section 8 came in force, the Court of Appeal had difficulty applying section 36 to an endowment mortgage because the endowment was a separate contract from the mortgage. There had been no default in paying the latter which was not due to be paid until a date long into the future. *Bank of Scotland v Grimes*⁴⁸ recognises, however, that the obligation to pay off the mortgage at the end of the mortgage period is a 'deferred payment' within the meaning of section 8(1).

Must the Lender Obtain a Court Order for Possession or Sale?

Ropaigealach v Barclays Bank Plc

It has already been shown that a mortgagee has a right to sell the mortgaged property without first obtaining a court order.⁴⁹ Must the mortgagee obtain a court order for possession as a pre-condition to exercising the power of sale? Strange as it may seem this is not the case even after the enactment of section 36 of the Administration of Justice Act 1970. The mortgagee's right to go into possession of the mortgaged property without a court order, notwithstanding section 36, was confirmed by the Court of Appeal in *Ropaigealach v Barclays Bank Plc*.⁵⁰ Two of the judges who decided that case acknowledged the anomaly but considered that this was a matter for the legislature to fix.⁵¹ Section 36 simply states that where a mortgagee claims possession of land including a dwelling house the court may suspend the possession order or otherwise adjourn the proceedings to give the mortgagor time to get back on track. It does not in terms state that the mortgagee *must* seek a possession order. It was explained above that if the mortgagee wanted to sell the property vacant possession would be desirable⁵² and there is also the risk of committing the criminal offence of using or threatening violence to gain entry to occupied property.⁵³ The property

⁴⁵ *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952. This resolves the doubts expressed by Smith, n. 55 *infra*, at 274 whether section 36 applied to traditional mortgages.

⁴⁶ *Habib Bank Ltd v Taylor* [1982] 3 All ER 561, at 564 (Oliver LJ).

⁴⁷ [1977] 1 Ch 1.

⁴⁸ [1985] 2 All ER 254. For discussion see H. Wallace, 'Mortgagees and Possession' (1986) 37 *NILQ* 336, at 344-348.

⁴⁹ See n. 31 *supra* and text following.

⁵⁰ [1999] 4 All ER 235.

⁵¹ *Ibid*, at 252 (Clarke LJ), 256 (Henry LJ).

⁵² See n. 31 *supra* and text following.

⁵³ Criminal Law Act 1977 section 6; note also Protection from Eviction Act 1977 section 1.

in *Ropaigealach* was unoccupied so neither of these considerations affected the lender's decision to go into possession.⁵⁴

Ropaigealach confirms what Smith,⁵⁵ Clarke,⁵⁶ and Dixon⁵⁷ all suggested – that if the mortgagee need not get a court order, going into possession is a right and not a remedy, although all three took the view that it should be a remedy. Clarke's article was first an attempt to construct a case that section 36 did require the mortgagee to obtain a court order and was the basis for Mantell LJ's grant of leave to appeal in *Ropaigealach*. Secondly, it was an argument for a new statutory provision to replace section 36 which would make possession a remedy that the mortgagee could seek if it could show either default by the mortgagor that could not be remedied within a reasonable time or some threat to the mortgagee's security that could only be averted through possession.⁵⁸ Clarke acknowledged that replacing the mortgagee's *right* with a *remedy* would require some thought to be given to how the mortgagee's rights to the mortgaged property would be affected and this would need to be reflected in the amending legislation.⁵⁹ Dixon's reasons for favouring treating possession as a *remedy* were partly influenced by worries that less reputable lenders might not seek court orders for possession and attempt to 'persuade' the mortgagor to leave.⁶⁰

Horsham Properties Group Ltd v Clark

Ropaigealach was a decision pre-Human Rights Act 1998. The issue was re-examined after the Human Rights Act by Briggs J in *Horsham Properties Group Ltd v Clark*.⁶¹ In this case, following default by the mortgagors, the mortgagees appointed receivers over the mortgaged property pursuant to the power contained in both section 101(1)(iii) of the Law of Property Act 1925 and a clause in the mortgage conditions themselves. The receivers sold the property under section 101(1)(i) of the 1925 Act and another clause in the mortgage conditions. The purchaser transferred the property to the claimants who brought an action for possession against the mortgagors claiming that they were trespassers as all their rights in the property had been overreached by the receivers' sale. The mortgagors' defence was that the mortgagee's power to sell the property without first obtaining a court order for possession violated their right to peaceful enjoyment of their possessions guaranteed by article 1 of the First Protocol to the European Convention on Human Rights.

Briggs J side-stepped the issue of the Convention's horizontal effect and held that article 1 of the First Protocol was not infringed because the mortgagors had not been deprived of any property right (or 'possession') as under their contract with the mortgagees their rights were delimited in such a way that the statute deprived them of nothing. In other words they had

⁵⁴ The borrower challenged the mortgagee's right afterwards.

⁵⁵ R.J. Smith, 'The Mortgagee's Right to Possession – the Modern Law' (1979) *Conv.* 266, at 267.

⁵⁶ Alison Clarke, 'Further Implications of Section 36 of the Administration of Justice Act 1970' (1983) *Conv.* 293, at 293-94.

⁵⁷ Martin Dixon, 'Sorry, We've Sold Your Home: Mortgagees and Their Possessory Rights' (1999) 58 *CLJ* 281, at 283.

⁵⁸ Clarke, *supra* n. 56, at 301. Note that below it is argued that in light of modern conditions a threat to the mortgagee's security might arise without significant fault on the part of the mortgagor.

⁵⁹ *Ibid*, at 301-05.

⁶⁰ Dixon, *supra* n. 57, at 282.

⁶¹ [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255.

rights over the property so long as they complied with the terms and conditions of the mortgage but those rights came to an end once they defaulted. The statutory power of sale implemented the private bargain of the parties and thus took nothing away from the mortgagors. If, contrary to this argument, the mortgagors' rights had been taken away by statutory provision without a court order this could be justified in terms of article 1 as in the public interest because:-

“ ... it reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years, in which the ability of a mortgagee to sell the property offered as a security without having to go to court has been identified as a central and essential aspect of the security necessarily to be provided if substantial property based secured lending is to be available at affordable rates of interest.”⁶²

As shall be revealed below subsequent European and domestic jurisprudence may cast some doubt upon the accuracy of this statement.

Land Registration Act (NI) 1970

Before proceeding to those developments it may be interesting to pause and note some legislative provisions in Northern Ireland that appear to have no English counterpart. These are the distinctive legislative provisions referred to in the introduction to this essay. Schedule 7, Part 1, paragraph 5(1) of the Land Registration Act (NI) 1970⁶³ provides that the owner of a registered charge on registered land in Northern Ireland has:-

“the rights and powers of a mortgagee by deed within the meaning of the Conveyancing Acts, including the power to sell the estate which is subject to the charge ...”

Thus the chargee could appoint a receiver and sell the property under section 19(1) of the Conveyancing Act 1881. But if the chargee wants to obtain possession of the property it seems that application to the court must be made under Schedule 1, Part 1, paragraph 5(2) which provides that:-⁶⁴

“The registered owner of a charge may apply to the court for the possession of the registered land, the subject of the charge, or any part of that land, and—

- (a) on such application, the court may, subject to sub-paragraph (3), order the possession of the land, or that part thereof, to be delivered to him; and
- (b) upon so obtaining possession of the land or, as the case may be, that part thereof, he shall be deemed to be a mortgagee in possession.

Paragraph 5(3) then states:-

⁶² *Ibid*, at [44], 1266.

⁶³ A statute passed by the devolved Parliament of Northern Ireland established by the Government of Ireland Act 1920.

⁶⁴ Note that this power is, unlike section 36 of the Administration of Justice Act 1970, not restricted to charged land containing a dwelling house.

“The power conferred on the court by sub-paragraph (2) shall not be exercised—

- (a) except when payment of the principal sum of money secured by the deed of charge has become due and the court thinks it proper to exercise the power; or
- (b) unless the court is satisfied that, although payment of the principal sum has not become due, there are urgent and special reasons for exercising the power.”

Professor Wallace has described the effect of these provisions as follows:-

“Thus, under paragraph 5(2)(a) the court has a discretion rather than a duty to make an order for possession and paragraph 5(3)(b) makes it clear that only in the most exceptional circumstances will a chargee be given possession when the chargor has not been guilty of any default.”⁶⁵

There can be no taking of possession of registered land in Northern Ireland without a court order, and default by the chargor will be required unless there are urgent and special reasons for granting possession. Where there is default by the chargor the court must still be satisfied that it is proper to exercise the power. There is not much case law on these provisions⁶⁶ but notwithstanding that they may serve as a suitable model going forward for a revised procedure in England and Wales.

Subsequent European and Domestic Jurisprudence

Article 8 of the European Convention on Human Rights (ECHR), incorporated into domestic law by the Human Rights Act 1998, provides as follows:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In a series of social housing landlord repossession cases it has been authoritatively stated that the tenant of such a property has the right to challenge the proportionality of the landlord recovering possession even when under domestic law the tenant no longer has any rights to that property.⁶⁷ Implicit in the right to challenge the proportionality of repossession is the

⁶⁵ H. Wallace, ‘Mortgagees and Possession’ (1986) 37 *NILQ* 336, at 357.

⁶⁶ In two decisions by Master Ellison, *Swift Advances Plc v Heaney* [2013] NIMaster 18 and *GE Secured Loans Ltd v Morgan* [2013] NIMaster 19, possession was refused to second mortgagees because, *inter alia*, the Master did not think it proper to grant possession under Schedule 7 to the Land Registration Act (NI) 1970. The charged properties were in deep negative equity, with a substantial deficiency on the first charge in each case. Possession followed by sale would probably have damaged the security of the first charges.

⁶⁷ *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 AC 186; *Corby Borough Council v Scott* [2012] EWCA Civ 276, [2012] HLR 23; *Buckland v United Kingdom* (2013) 56 EHRR 16; *Thurrock Borough Council v West* [2012] EWCA Civ 1435, [2013]

right to make this challenge before an independent and impartial tribunal. But it is not completely clear that Article 8 has any major role to play in mortgagee repossession cases. Article 8.2 states that there shall be no interference with Article 8 rights by a *public authority* save within the specified grounds. The court is a public authority for the purposes of the Human Rights Act 1998⁶⁸ but in the context of Article 8 *public authority* may be confined to bodies like the housing authorities that brought the possession proceedings in the decisions referred to above. In *Manchester City Council v Pinnock*,⁶⁹ Lord Neuberger MR, giving the judgment of the Supreme Court, expressly stated that “nothing in this judgment is intended to bear on cases where the person seeking the order for possession is a private landowner.” Sir Alan Ward took the view that Article 8 had horizontal effect and thus could be pleaded against a private landowner in *Malik v Fassenfelt*⁷⁰ but this issue was not under appeal in that case and Sir Alan’s views were not shared by Lord Toulson and Lloyd LJ, the other members of the Court of Appeal. In *McDonald v McDonald*⁷¹ the Supreme Court ruled that Article 8 could not be relied on against a private landlord seeking possession of an assured shorthold tenancy under section 21 of the Housing Act 1988. The potential fuller effect of Article 8 on mortgagee repossession cases will be considered below but in the context of the mortgagee’s need to get a court order it would seem that the mortgagor’s rights may rest more securely on Article 6.1 of the ECHR where it is provided that “[i]n the determination of his civil rights and obligations , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁷²

Conclusion on this question

European Convention and Human Rights Act thinking is developing and the law at present is not completely clear. The current position in social housing landlord cases is very different from the one taken by the House of Lords in *Harrow London Borough Council v Qazi*⁷³ less than a decade before *Pinnock*. But all the developments have been in relation to the extent of the courts’ powers when a landowner seeks possession; they are not in relation to the question of whether the landowner must seek a court order. It is surely unacceptable in this day and age that a lender can simply take possession of mortgaged property and evict the borrower with no other obstacle in the way than potential criminal liability. In the context of section 36 this would mean that the borrower would always have the chance to ask the court to suspend the order for possession or otherwise adjourn proceedings to give the borrower a chance to get back on track within a reasonable time. The position under the Land

HLR 5; *Fareham Borough Council v Miller* [2013] EWCA Civ 159, [2013] HLR 22; *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231, [2014] HLR 23; *Circle 33 Housing Trust v Lawal* [2014] EWCA Civ 1514, [2015] HLR 9; *Sims v Dacorum Borough Council* [2014] UKSC 63, [2014] 3 WLR 1600; *R(N) v Lewisham London Borough Council* [2014] UKSC 62, [2014] 3 WLR 1548; *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] 2 WLR 721. For discussion and analysis see Rachael Walsh, ‘Stability and Predictability in English Property Law – the Impact of Article 8 of the European Convention on Human Rights Reassessed’ (2015) 131 *LQR* 535.

⁶⁸ By section 6(3)(a).

⁶⁹ [2010] UKSC 45, at [4].

⁷⁰ [2013] EWCA Civ 798.

⁷¹ [2016] UKSC 28.

⁷² See I. Loveland, ‘Peaceable Entry to Mortgaged Premises: Considering the Doctrine’s Compatibility with the HRA 1998’ (2014) *Conv* 381 for a view to the effect that Article 8 supports this position.

⁷³ [2003] UKHL 43, [2004] 1 AC 983.

Registration Act (NI) 1970 supports this prior obtaining of a court order and this has recently become the position in the Republic of Ireland⁷⁴ and in Scotland.⁷⁵

The proposition advanced above was the provisional recommendation of the United Kingdom Ministry of Justice consultation paper issued in 2009.⁷⁶ Legislative reform should be made to clarify the law and place this restriction upon the exercise of the lender's security on the statute book. This legislation should specify that before a lender can sell the mortgaged property it must first obtain a court order for possession. Without an order for possession the lender should neither be entitled to go into possession nor sell the property. The Ministry of Justice consultation paper records a statement made by the Council of Mortgage Lenders that this is industry practice⁷⁷ and another that the Financial Services Authority had written to all lending institutions in the UK stating that if the power of sale were exercised without obtaining a prior court order this would be treated as an unfair practice.⁷⁸ The 'what ain't broke don't need to be fixed' argument should be rejected here. It is unsatisfactory that it should be possible even theoretically to evict someone from their home without an independent tribunal being able to decide if all necessary legal conditions for taking this step have been met. As there is no reason to doubt the accuracy of the Ministry of Justice statement that the prior obtaining of a court order for possession is the invariable industry practice there could be no significant burdens for lenders if this became a legal requirement. As Lisa Whitehouse pointed out the law should be changed rather than rely on regulatory action because regulation is always at a distance.⁷⁹ Owing to the uncertainties applying to abandoned or unoccupied property the Ministry was right in its recommendation that the need to obtain a court order should apply to these properties,⁸⁰ although the borrower's agreement to allow the lender to go into possession and sell should make any court order unnecessary.⁸¹

An issue which would require some attention, and this is another reason for legislative reform, is what mortgages this requirement of prior court order should apply to. The consultation paper's recommendation was "residential owner-occupied mortgages", by which is meant a mortgage taken out to purchase a property that the mortgagor intends to live in. Section 36 applies to all mortgages of land "which *consists of or includes* a dwelling-house."⁸² This may be too broad as it would include buy-to-let mortgages and mortgages to secure a loan for commercial purposes.⁸³ Space does not permit a lengthy discussion of this issue. It is flagged at this stage to make clear that it would not be sufficient to make the

⁷⁴ Land and Conveyancing Law Reform Act 2009. For discussion see P. Kenna and K. Lynch-Shally, 'Comparing Mortgage Law in England and Ireland' (2014) *Conv.* 294.

⁷⁵ Home Owner and Debtor Protection (Scotland) Act 2010. See L. Whitehouse, 'A Longitudinal analysis of the Mortgage Repossession Process 1995-2010', in S. Bright (ed), *Modern Studies in Property Law* (vol. 6, Oxford, 2011), 151, at 169-72.

⁷⁶ *Mortgages: Power of Sale and Residential Property* CP55/09 (December 2009).

⁷⁷ *Ibid*, at para 65.

⁷⁸ *Ibid* at para 67.

⁷⁹ L. Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72 *MLR* 793, at 797, 804.

⁸⁰ Ministry of Justice consultation paper, *supra* n. 76, at para 118.

⁸¹ *Ibid*, at para 119.

⁸² Emphasis added.

⁸³ Ministry of Justice consultation paper, *supra* n. 76, at para 120.

requirement for a prior court order applicable to section 36 cases without further legislative clarification of the scope of this provision.

Suspending the Possession Order

Section 36 allows the court, when asked by a lender to grant an order for possession, to suspend the order or otherwise adjourn the proceedings if satisfied that the borrower could clear the arrears and get back to paying off the mortgage regularly within a reasonable time. Today most repossession cases are processed through the soft law provisions made by the Mortgage Conduct of Business Rules issued by the Financial Conduct Authority and the Mortgage Pre-Action Protocol that will be discussed at the end of this section of the essay. For now it is necessary to examine the section 36 case law in detail because it provides the framework within which the soft law operates.

The case law analysis proceeds in four sub-sections. First it discusses case law between the time when section 36 came into force and the important decision of the Court of Appeal in *Cheltenham and Gloucester Building Society v Norgan*.⁸⁴ The second sub-section discusses *Norgan*, the cases after *Norgan*, and the somewhat contrasting approach taken by the High Court in Northern Ireland in *National and Provincial Building Society v Lynd*.⁸⁵ The third sub-section considers how the section 36 powers should be exercised in the very different context of the housing market described in the first section of this essay. The fourth sub-section will discuss the potential impact of the Human Rights Act 1998 on the exercise of the courts' powers under section 36.

1. Pre-Norgan

The first important decision on the issue of suspending the possession order or adjourning the proceedings was *Royal Trust Co of Canada v Markham*⁸⁶ where the Court of Appeal emphasised that whether the borrower was likely to be able to pay sums due under the mortgage within a reasonable period was a question of fact to be determined by the court on the evidence before it. However the court must define what the reasonable period was to be in the context of the particular case or at least render that period ascertainable. The lender's appeal against suspension of the possession order was allowed because there was no evidence before the court supporting the conclusion that the sums due could be paid within a reasonable time. Borrowers failed to obtain suspensions in *Citibank Trust Ltd v Ayivor*⁸⁷ and *Town & Country Building Society v Julien*⁸⁸ because, even though it seemed they could pay instalments as they fell due, there was no reasonable prospect of them clearing arrears. In two cases borrowers unsuccessfully argued that a successful counterclaim against the lender would enable them to pay off arrears. In *Citibank v Ayivor* above Mervyn Davies J held that section 36 did not alter the rule that a counterclaim did not affect the mortgagee's right to possession, and furthermore the counterclaim would not have enabled the arrears to be

⁸⁴ [1996] 1 WLR 343.

⁸⁵ [1996] NI 47.

⁸⁶ [1975] 1 WLR 1416.

⁸⁷ [1987] 1 WLR 1157.

⁸⁸ (1992) 24 HLR 312.

cleared within a reasonable time. In light of *Norgan* below and the acceptance that the remaining term of the mortgage can constitute a reasonable period, it is not thought that this decision, which the judge made without enthusiasm,⁸⁹ is necessarily correct. *Julien* rests on the sounder basis that the counterclaim was hopeless. A more tender approach may be taken where the borrower has a civil claim against a third party. In the Northern Ireland High Court case of *Northern Bank Ltd v McTaggart*⁹⁰ Girvan J suspended a possession order on condition that the borrower paid the lender £75 per month from a disposable income of £165 per month. The borrower had a road traffic accident civil claim which the judge considered to have an uncertain outcome and an unclear timeframe. The lender was permitted to bring the matter back to court if the borrower was awarded damages and the borrower was required to keep the lender informed on demand of material developments with the claim. In *Cheltenham and Gloucester Building Society v Grattidge*⁹¹ the Court of Appeal said that it was usually better to suspend any money judgment for arrears that accompanied the suspended possession order as well.⁹²

The last appellate tribunal pronouncement on this question before *Norgan* was *Cheltenham and Gloucester Building Society v Grant*.⁹³ The Court of Appeal stressed that the money judgment for arrears should be suspended on the same terms as the possession order. Judges could make decisions on the basis of informal material supplied by borrowers or their legal representative, not just sworn affidavit or oral evidence, particularly where the borrower was in court and could be questioned. The Court of Appeal clearly would not have granted a suspension of the possession order itself on the material before the district judge but dismissed the lender's appeal because the judge's decision was not plainly wrong. As Professor Thompson observed this decision clearly highlighted the need for clearer guidance from the Court of Appeal as to how district judges should exercise the section 36 discretion.⁹⁴

2. *Norgan and its Sequel*

In *Cheltenham and Gloucester Building Society v Norgan*⁹⁵ Mrs Norgan had bought out her husband's half share in the family home with the aid of a building society mortgage, in order to provide him with business finance. The mortgage fell into arrears and a possession warrant obtained by the lender was suspended four times before the application in these proceedings came before the courts. Although the arrears were substantial there was sufficient equity in the property to make the lender's security safe. The issue before the Court of Appeal turned on the weight to be attached to the usual practice of county court judges of measuring a

⁸⁹ [1987] 1 WLR 1157, at 1164. In *Douglas Systems Ltd v Hawkey* (Court of Appeal, 16 December 1987, unreported) it was suggested that if a counterclaim was sufficiently strong a stay would be appropriate; see Haley, n. 34 *supra*, at 492.

⁹⁰ Unreported, October 2000.

⁹¹ (1993) 25 HLR 454.

⁹² In *Cheltenham and Gloucester Building Society v Johnson* (1996) 28 HLR 885 the Court of Appeal again approved this approach, indicating that a departure from it could be justified where there was a good chance that the property might be sold in the near future. This, however, would not be a case where the court was suspending a possession order to give the borrower time to pay.

⁹³ (1994) 26 HLR 703.

⁹⁴ M.P. Thompson, 'A Very Wide Discretion?' (1995) *Conv.* 51.

⁹⁵ [1996] 1 WLR 343.

‘reasonable period’ as being about two to four years. As Mrs Norgan could not clear the arrears and get back to paying off the mortgage regularly within such a timespan it was thought that the ‘reasonable period’ requirement could not be satisfied. The Court of Appeal, however, held that the reasonable period contemplated by section 36 was not limited to a period on such scale and could, in a case like this one where the borrower was required to pay off the mortgage at the end of the full term with interest payments in the meantime and the lender’s security was not at risk, extend to the remaining term of the mortgage. It is necessary to discuss in some detail the extent to which *Norgan* is precedent authority for a ‘remaining term’ presumption in section 36 cases.

The two principal judgments were given by Waite LJ and Evans LJ. Waite LJ said that, although the court should not make an assumption to this effect, it should take ‘remaining term’ as its starting point in setting a reasonable period.⁹⁶ A detailed budget should be provided by borrowers to assist the court in determining the reasonable period⁹⁷ and regard should be had to whether the lender’s security was at risk.⁹⁸ If it were the court could not just suspend for the remainder of the term and hope for the best. If the possession order were suspended for the ‘remaining term’ there would be fewer court hearings with attendant costs were the plan adhered to. If the borrower defaulted again it might be harder to justify giving him or her another chance.⁹⁹

Although Evans LJ entirely agreed with Waite LJ¹⁰⁰ and also agreed with the observation of Scarman LJ in *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham* that “one begins with a powerful presumption of fact in favour of the period of the mortgage being the ‘reasonable period’”¹⁰¹ it is suggested that his judgment, taken as a whole, did not endorse the remaining term as a “powerful presumption of fact” to be departed from only if there were good reason. This seems to follow from Evans LJ’s practical summary of the Court of Appeal’s conclusions in the last paragraph of his judgment:-

“.... the following considerations are likely to be relevant when a “reasonable period” has to be established for the purposes of section 36 of the Act of 1970. (a) How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated? (d) How much remains of the original term? (e) What are the relevant contractual terms, and what type of mortgage is it, i.e. when is the principal due to be repaid? (f) Is it a case where the court should exercise its power to disregard accelerated payment provisions (section 8 of the Act of 1973)? (g) Is it reasonable to expect the lender, in the circumstances of the particular case, to recoup the arrears of interest (1) over the whole of the original term, or (2) within a shorter period, or even (3) within a longer period, i.e. by extending the repayment period? Is it reasonable to expect the lender to capitalise the interest or not? (h) Are there reasons affecting the

⁹⁶ *Ibid*, at 353.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*, at 354.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*, at 355.

¹⁰¹ (1974) 28 P. & CR. 69, at 75, quoted at [1996] 1 WLR 343, at 356.

security which should influence the length of the period for payment? In the light of the answers to the above, the court can proceed to exercise its overall discretion, taking account also of any further factors which may arise in the particular case.”¹⁰²

What this means is that all the relevant circumstances of the case must be taken into account in assessing the reasonable period. When due regard is paid to the previous practice of two to four year suspensions, full term mortgages with interest only to be paid until the end of the term, and a lender at no substantial risk of losing its security, *Norgan* simply says that the courts have the ‘remaining term’ to work with in setting a reasonable period. They are not stuck with two to four years or anything like that. To the extent that there is a starting point it clearly makes sense to specify where this should be. What the actual ‘reasonable period’ should be in any particular case will depend upon the facts and circumstances of that case. The previous approach had unhelpfully fettered the discretion of the court to take account of those particular circumstances.

Norgan has been broadly welcomed by commentators.¹⁰³ By showing a willingness to set a reasonable period as the ‘remaining term’ it is considered to understand the social policy of the legislation to enable borrowers to complete the purchase of their homes. By emphasising the importance of the lender’s security not being at risk it can be considered balanced and fair. By insisting on detailed budgets from borrowers it does something to answer Professor Thompson’s call above for more guidance from the Court of Appeal.¹⁰⁴ Professor Thompson’s prediction that *Norgan* renders section 8’s deferral provision redundant would appear to be borne out by the non-mention of section 8 in subsequent case law.¹⁰⁵

Lynd

On the face of things the decision of Girvan J in *National and Provincial Building Society v Lynd*¹⁰⁶ appears to reject *Norgan*.¹⁰⁷ His lordship pointed out that the Payne Report envisaged stays operating for a limited period of time,¹⁰⁸ and characterised ‘remaining term’ stays as major restructurings of mortgages going beyond the temporary difficulties section 36 was enacted to address.¹⁰⁹ Girvan J also said that doing justice between the parties required the

¹⁰² *Ibid*, at 357-358.

¹⁰³ M.P. Thompson, ‘Back to Square Two’ (1996) *Conv.* 118; J. Morgan, ‘Mortgage Arrears and the Family Home’ (1996) 112 *LQR* 553; M. Haley, n. 34 *supra*.

¹⁰⁴ *Supra* n. 94.

¹⁰⁵ See Thompson, n. 103 *supra*, at 124.

¹⁰⁶ [1996] NI 47.

¹⁰⁷ Since Northern Ireland is a separate legal jurisdiction from England and Wales its courts are not technically bound by decisions of the Court of Appeal in England, even on a legislative provision that applies in both jurisdictions.

¹⁰⁸ [1996] NI 47, at 55, referring to para 1383 of Payne. To the extent that the judge relied on this recommendation in not following *Norgan* he may have been reasoning inconsistently with the rather puzzling later passage in his judgment where he said that the court could take account of the Payne Report to ascertain the mischief the statutory provision was directed at but not to construe the legislation – see [1996] NI 58. The mischief the legislation was directed at was the absence of any meaningful power to suspend a possession order to allow the borrower to get back on track. Determining whether a reasonable period was or was not usually the remaining term of the mortgage seems to have been what the learned judge meant by construing the legislation.

¹⁰⁹ *Ibid*, at 54.

borrower to make his or her best realistic proposals to clear the arrears. Starting from full term was likely to lead to the borrower making payments that were less than the borrower could afford.¹¹⁰ Neither would less than best realistic proposals necessarily be in the borrower's best interests because it was likely to lead to the borrower paying interest on arrears for longer and thus paying more interest than would be payable otherwise.¹¹¹

However, if *Norgan* is understood in the way that it was presented above, if Girvan J's reliance upon the judgment of Evans LJ is given appropriate weight, and the actual decision in *Lynd* is examined, it will become apparent that the differences between these decisions are more apparent than real. Girvan J expressly agreed with Evans LJ's enunciation of the relevant considerations going to the working out of a reasonable period in *Norgan*,¹¹² and accepted that 'remaining term' could be a reasonable period in a particular case. The "powerful presumption" in favour of 'remaining term' was without logical foundation,¹¹³ but with respect to his lordship the "powerful presumption" was actually Scarman LJ's idea in the *First Middlesbrough* case.¹¹⁴ It is true that only *Lynd* contains an express commitment to the borrower's best realistic proposals but *Norgan* only ignores this if it is understood as resting on this "powerful presumption." In *Lynd* the borrower's accumulated arrears were close to the point where the lender's security was at risk so the *Norgan* approach would almost certainly not have resulted in a 'remaining term' suspension.¹¹⁵ As regards the actual disposition of the case Girvan J confirmed a proposal by the borrower accepted by the lender that would, if adhered to, have paid off the arrears well before the end of the mortgage. Due to the history of payments in the case the judge decided to keep an eye on how the discharging of arrears was progressing and so he adjourned the case for six months. If it then appeared that payments were being kept up the possession order would be suspended conditional upon those payments continuing to be made.¹¹⁶

Heather Conway and Sheena Grattan have written:-

"The decision in *Lynd* suggests a structured approach for determining section 36 applications based on the factors proposed by Evans LJ in *Norgan* without any prior disposition towards the length of the postponement period, while attempting to balance the interests of both borrower and lender."¹¹⁷

No challenge is offered to this conclusion although the authors' suggestion earlier in their paper that *Lynd* offers a significantly different approach to *Norgan* may slightly overstate the case. Similarly Lara McMurtry's preference for *Norgan* over *Lynd* also makes too much of the difference between these decisions.¹¹⁸

¹¹⁰ *Ibid*, at 60.

¹¹¹ *Ibid*.

¹¹² *Ibid*, at 57, referring to [1996] 1 WLR 343, at 357-358.

¹¹³ *Ibid*, at 59.

¹¹⁴ *First Middlesbrough Trading and Mortgage Co Ltd v Cunningham* (1974) 28 P & CR 69, at 75.

¹¹⁵ [1996] NI 47, at 63, where Girvan J acknowledged that *Norgan* was distinguishable on this ground.

¹¹⁶ *Ibid*, at 64.

¹¹⁷ H. Conway and S. Grattan, 'Northern Ireland: A Forgotten Jurisdiction. Falling Behind or Forging Ahead?', in E. Cooke (ed), *Modern Studies in Property Law* (vol 2, Oxford, Hart Publishing, 2003), 203, at 215.

¹¹⁸ McMurtry, n. 37 *supra*, at 202-203.

The Sequel to Norgan

Lara McMurtry has pointed out that the post-*Norgan* period was one of historically low levels of repossession.¹¹⁹ This is unlikely to be attributable to *Norgan* as it was a time of reduced interest rates, a strong economy and labour market, and a proliferation of competitive mortgage products, all of which contributed to a significant growth in borrowing and consumer confidence. The more recent period has been quite different in these respects and the issues raised by this experience will be discussed below.

Possession orders were made without suspension in *Halifax Plc v Purvis*,¹²⁰ *Realkredit Danmark v Brookfield House*,¹²¹ and *Halifax Plc v Okin*.¹²² These decisions were not on their face cases where the so-called “powerful presumption” of *Norgan* was rebutted, but neither do they establish that the presumption did not exist. Empirical research by Lisa Whitehouse supports the theory that post-*Norgan* district judges did not apply any such presumption,¹²³ mainly because extending interest payments on arrears over the life of the mortgage required borrowers to pay more interest for longer. In *Jameer v Paratus AMC*¹²⁴ the Court of Appeal reiterated the need for borrowers seeking a stay to supply the court with accurate information about their financial position and credible evidence of ability to pay.

What is the Appropriate Approach to Take?

It would be helpful to try and distil from the main cases on suspending possession orders a rational approach that draws upon the various considerations *Norgan* and *Lynd* indicate must be taken into account. It is suggested that if it seems that the borrower could pay off the arrears and all other mortgage payments by the end of the mortgage term and there is no significant danger that the lender’s security is at risk then the court *should* suspend the possession order or otherwise adjourn the proceedings. This is all that *Norgan* decides. It rejects the notion that only periods of two to four years would be the appropriate period for which to suspend. It points out that the ‘remaining term’ is the time within which the court can select a ‘reasonable period’. Evans LJ’s judgment leaves open the possibility that longer than the ‘remaining term’ might be selected in an appropriate case but this is likely to be very rare indeed. What the reasonable period within the ‘remaining term’ should be is a separate question. A period approximating to the borrower’s ‘best realistic proposals’ as explained by Girvan J in *Lynd* seems like a suitable period in the interests of both parties. ‘Remaining term’ is appropriate where it seems that the borrower can get back on track without too much difficulty and the lender’s security is safe because, *inter alia*, this saves costs by avoiding unnecessary court proceedings assessing how the restructured payment plan is progressing.

¹¹⁹ *Ibid*, at 195. Post-*Norgan* period should probably be understood as down to 2007 when McMurtry’s article was published.

¹²⁰ (1999) 77 P & CR D29 (borrower could possibly keep up regular payments but could not clear the arrears).

¹²¹ (1999) 77 P & CR D31 (borrower had agreed to pay more than he earned, and the sum due exceeded the value of the property so the lender’s security was at risk).

¹²² [2007] EWCA Civ 567 (borrower could neither keep up instalments nor clear the arrears).

¹²³ Whitehouse, n. 30 *supra*, at 162-164.

¹²⁴ [2012] EWCA Civ 1924.

Those costs may be unavoidable where the situation is less stable and alterations to the original plan may prove to be necessary.

3. Section 36 in the Contemporary Context

It has already been noted that the Payne Committee recommended the introduction of a statutory discretion to suspend possession orders or otherwise adjourn possession proceedings to allow time for borrowers to overcome temporary financial difficulties. In *Bank of Scotland v Grimes* Griffiths LJ had this to say about the purposes of sections 36 of the Administration of Justice Act 1970 and section 8 of the Administration of Justice Act 1973:-

“It is the intention of both sections to give a measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgages and in danger of losing their homes.”¹²⁵

However, as the first section of this essay has shown the contemporary context indicates the prevalence of two other very different problems which section 36 now has to grapple with. The first is the reduction in the amount of public sector housing available to let to persons made homeless by mortgagee repossessions.¹²⁶ It is one thing to put someone out of their home when there is a reasonably plentiful supply of social housing to offer as an alternative; it is quite another when the potential consequences of making a possession order are that the mortgagor becomes homeless. Attention was drawn above to the increased phenomenon of people in lower income groups who have purchased homes on mortgage.¹²⁷ It must surely be reasonable to conclude that this is in part explained by the absence of social housing alternatives. However it is difficult to see how section 36 can be applied so as to take the risk of homelessness into account.

This second problem concerns those mortgages which were barely affordable or simply unaffordable from the very beginning, where lenders advanced funds on a rising market believing that if borrowers fell into arrears the mortgaged property would be sufficient security for the loan. The subsequent fall in the value of mortgaged property has resulted in a serious problem of negative equity where the property is insufficient security for the loan. This can place borrowers who fall into arrears in a very difficult position. They may have a viable plan for paying off arrears and meeting ongoing mortgage payments but negative equity would place the lender's security in jeopardy. *Norgan, Lynd*, and other cases have stressed that the approach to suspending possession orders should depend to a large extent on whether the lender's security is at risk. But in these cases it is not the default of the borrower that is the main cause of the lender's security being at risk. The borrower may be able to demonstrate that the lender can be restored to the position it would have been in if the borrower had made no default. That would not be a good position but that is down to a mixture of market conditions and bad commercial judgment. Surely it cannot be right that in

¹²⁵ [1985] 2 All ER 254, at 259.

¹²⁶ See ns. 5-10 *supra* and text.

¹²⁷ See n. 14 *supra* and text.

these situations the borrower is still evicted despite doing all that can reasonably be asked in terms of remedying the situation.¹²⁸

At the same time it must be recognised that some borrowers were engaging in reckless speculation. They were buying residential property, often apartments, with no intention of residing in them.¹²⁹ Some were buying 'off the plans'¹³⁰ and intending to 'flip' the property once the relevant building was erected. Some were buying to rent. Many believed there was no investment safer than real estate and that property values only ever rose. The problem discussed above is simply the one about the purchaser who was buying a residence. Does it follow that the same leeway shown to borrowers who can restore their lenders to the position they would have been in had no default occurred should apply with equal force to the speculative investor? In this scenario both parties to the mortgage contract have made poor, possibly even foolish, commercial decisions and made assumptions about the condition of the property market they were simply not entitled to make. To say to a speculative purchaser like this, that the section 36 discretion will not be exercised so liberally in their favour, has an undoubted appeal but there is no sign in section 36 that Parliament ever contemplated this distinction.¹³¹ What should be the approach where a purchaser acquires on mortgage a property he or she intends to live in but which is well beyond their needs? If there are good reasons to doubt whether the borrower can get back on track within a reasonable period, may the court lean against suspending the possession order and effectively force the borrower to downsize?

Although the market conditions and accompanying problems of recent years were probably not within the legislature's contemplation when section 36 was enacted, it is possible that section 36 is capable of addressing most of the challenges they pose. The court has discretion under section 36 and, in determining what is a reasonable period for the paying off of arrears, these wider contexts may be legitimate matters to take into account. This is social legislation designed to help borrowers become the owners of their homes. A reasonable period to get back on track towards achieving this objective may legitimately be treated as a longer period than a reasonable period to make a profit from speculation on the property market.

4. *Impact of Human Rights Act 1998*

It was shown in the previous section of this essay that the better view of the relationship between the mortgagee's right to go into possession of the mortgaged property and the

¹²⁸ In passing it is worth referring to anecdotal evidence to the effect that some borrowers in negative equity may get into arrears or increase arrears through taking the occasional 'mortgage holiday' to enable them to pay for something else, taking the risk that the lender will not think it worthwhile to enforce security when so much would be lost on resale. These are obviously not cases where the borrower offers a viable plan for paying off arrears.

¹²⁹ This is a development of the 'housing as investment' phenomenon identified by Professor Susan Smith, *supra* n. 12.

¹³⁰ Where the purchaser buys a unit in an apartment building yet to be completed. Completion often takes about two years and, during the property boom of the 2000s, considerable increase in property values occurred. See *Titanic Quarter Ltd v Rowe* [2010] NI Ch 14, where the value of the property had fallen, something which caused grave difficulties for purchasers whose contracts contained no 'subject to finance' clause.

¹³¹ This is a similar issue to the one raised in the Ministry of Justice consultation paper about what kind of properties should be within the statutory protection; see ns 76-83 *supra*.

Human Rights Act 1998 is that the mortgagee must get a court order before evicting the mortgagor from his or her home. Whatever the doubts remaining about this as a proposition of law it will be assumed for the remainder of this sub-section that this is the legal position in England and Wales and Northern Ireland at present. If the lender must obtain a court order the borrower is in a position to ask the court to suspend the possession order on terms as to clearing arrears and paying the mortgage, thus avoiding eviction so long as the terms are adhered to. Requiring the mortgagee to obtain a possession order would provide valuable protection for the mortgagor because the court would be obliged first to ensure that all legal requirements for enforcing the mortgage had been complied with and secondly that the section 36 discretion were applied. However the question to be addressed at this stage goes further than this. Given that the mortgagor would be evicted from their home, does Article 8 of the ECHR allow the court to decide that eviction would be disproportionate notwithstanding the fact that the legal requirements just mentioned were satisfied and there was no sensible basis for concluding that the mortgagor could pay off arrears and get back on track within a reasonable time? Doubts were expressed above as to whether Article 8 applied outside of social housing contexts. The need to get a court order for repossession was based on Article 6 and the question of Article 8's applicability was postponed until now.¹³² What is in issue at this point is the *horizontal* effect of the ECHR. Does it apply only between a public authority and a private person or body (vertical effect) or can it also apply between two private persons or bodies?¹³³ If Article 8 has horizontal effect then the proportionality of eviction could be an issue requiring consideration in addition to the other issues above. The discussion below will concentrate mainly on whether Article 8 has *horizontal* effect in the context of section 36 but some brief attention to how Article 8 might work in this context were it applicable will also be given.

In *Barclay's Bank Plc v Alcorn* the Court of Appeal said this about the compatibility of section 36 with Article 8:-

"It is plainly necessary, in the context of the wider economic well-being of a country, that home owners should be able to borrow – and banks and lending institutions should be willing to lend – on the basis that loans will be repaid. If loans are not to be repaid – and security is not to be enforced for that purpose – then the domestic mortgage market is likely to be seriously affected; and, with it, the economic well-being of the country. There is, therefore, a balance to be struck. Section 36 and its amending section strikes that balance. I can see nothing in the common law, as mitigated by section 36 of the 1970 Act and section 8 of the 1973 Act, which is inconsistent with the convention rights to which I have referred."¹³⁴

This might just mean that if section 36 has to be Article 8 compliant then it is. Or it might mean that section 36 is ECHR compliant generally quite apart from Article 8. Either way, as James Hurford has pointed out, it pre-dates *Pinnock* and other authorities discussed above.¹³⁵

¹³² See ns 67-72 *supra*.

¹³³ For present purposes it will be assumed that a publicly owned bank is a private body. See J. Hurford, 'Does Article 8 Broaden the Court's Powers under Section 36 of the Administration of Justice Act 1970?' (2014) 17 *Journal of Housing Law* 9, at 11-12, where this issue is briefly discussed.

¹³⁴ [2002] EWCA Civ 817, at [10].

¹³⁵ See Hurford n. 133 *supra*, at 11.

In order to reach as clear a conclusion on this question as is possible the essay will start with section 3 of the Human Rights Act 1998 and then go on to consider the recent English case law on the subject of Article 8's potential horizontal effect between private persons or bodies. Section 3 of the Human Rights Act provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." In relation to this provision two things should be pointed out to begin with. First, section 36 of the Administration of Justice Act 1970 is a provision of primary legislation, and secondly the duty to read primary legislation compatibly with the Convention applies without exception. The Convention right which has most significance in the context of section 36 is Article 8 which was set out above.¹³⁶ Included in this is respect for an individual's home. By Article 8.2 there can be no interference by a *public authority* with the individual's right to respect for his or her home except for the reasons enumerated in Article 8.2. In essence this means that the proportionality of eviction is in issue if either the mortgagee or the court is a *public authority* for the purposes of Article 8.2.

As an illustration of what reading and giving effect to legislation compatibly with the Convention involves, it is instructive to consider the House of Lords' decision in *Ghaidan v Godin-Mendoza*.¹³⁷ The defendant lived in a stable homosexual relationship lasting nearly 30 years with the protected tenant of a flat subject to the Rent Act 1977. The defendant was not permitted to succeed to the tenancy of the flat as the protected tenant's spouse after his death under Schedule 1 paragraph 2 of the 1977 Act, but became entitled to an assured tenancy of the flat (this did not offer the same security of tenure) as a member of the original tenant's family under paragraph 3 of the same Schedule. In possession proceedings brought by the owner of the freehold the defendant persuaded a majority of the House of Lords¹³⁸ to read and give effect to paragraph 2 compatibly with his Article 8 right to respect for his home and his Article 14 right to be free from discrimination. The majority noted that 'spouse' in paragraph 2 included a person who had lived with the tenant in a stable heterosexual relationship for an extended period of time. They then proceeded to read 'spouse' as now including a person who had lived with the tenant in a similarly stable same sex relationship for an extended period of time.¹³⁹ Two points of considerable significance should be made about this decision. First, the majority speeches made clear that reading and giving effect to legislation compatibly with the Convention so far as this was possible, required a search for the broad purpose of the legislation and depended in no way upon the need to find an ambiguity in the legislation. Secondly, in so far as this case was concerned with the defendant's Article 8 rights the point was not taken that it was a private person (the freeholder), and not a *public authority*, who was seeking to interfere with the defendant's right to respect for his home.

¹³⁶ See text following n. 66 *supra*.

¹³⁷ [2004] UKHL 30, [2004] 2 AC 557.

¹³⁸ Lord Millett dissented.

¹³⁹ This went further than the House's earlier decision in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, which pre-dated the coming into force of the Human Rights Act 1998 and which only allowed the same sex partner to succeed to the assured tenancy under paragraph 3 as a member of the protected tenant's family.

Moving on to the recent case law on horizontal effect post *Pinnock*, the first case of significance was *Malik v Fassenfelt*.¹⁴⁰ In this case a private landowner sought to recover possession of his land from a group of persons who were occupying it illegally. In issue was strictly speaking only the question of whether the eviction was disproportionate assuming that the defendants were entitled to raise this defence. The Court of Appeal was unanimous that eviction would not be disproportionate and the claimant was thus granted a possession order over his land. Sir Alan Ward analysed the case law on social landlords repossessing property and concluded that the same principles should apply to private landowners as well, largely on the basis that the court is a public authority and therefore has to do what other public authorities are obliged to do.¹⁴¹ Lord Toulson and Lloyd LJ, the other members of the court, expressly declined to decide whether Article 8 was available as a defence although the tenor of their judgments was clearly to the effect that it was not. Lord Toulson said that the ECHR imposes obligations on states rather than private individuals. He acknowledged that sometimes the Strasbourg court has held that there is an obligation on the part of states to take measures to protect a person's private life from interference by another private person, but described these as striking and unusual cases in which the applicants were victims of particularly objectionable conduct which seriously impaired their ability to live a normal life.¹⁴² He also argued that for the state to interfere with a private landowner's right in this way might be contrary to article 1 of Protocol 1.¹⁴³

In *McDonald v McDonald*¹⁴⁴ the horizontal effect of Article 8 was directly in issue. The respondents bought a property with the assistance of finance provided by a mortgage lender. In breach of several conditions of the mortgage they granted an assured shorthold tenancy of the property to their daughter, who had a mental disorder. When the fixed term of this tenancy ended it became an assured shorthold periodic tenancy. The respondents became unable to pay the mortgage and the lenders appointed receivers over the property under section 109 of the Law of Property Act 1925. The receivers, formally acting as the respondents' agents, served a notice to quit on the tenant under section 21(4) of the Housing Act 1988 and commenced possession proceedings. Section 21(4) imposed a duty on the court to make a possession order once a valid notice to quit had been served. The issues before the Supreme Court were – (a) whether the court was obliged to read section 21(4) compatibly with Article 8 if this were possible; (b) if the answer to (a) were 'yes' could section 21(4) be read compatibly or was the court obliged to issue a declaration of incompatibility under section 4 of the Human Rights Act 1998; and (c) if the answer to both (a) and (b) were 'yes' would it be disproportionate to evict the tenant? The Supreme Court answered all these questions against the tenant but for the purposes of this essay it is only necessary to discuss the court's treatment of question (a).

In holding that the court was not a public authority within the meaning of Article 8 the Supreme Court was much influenced by the statutory context in which the claim for possession of the property arose. Decades of rent control and enhanced security of tenure

¹⁴⁰ [2013] EWCA Civ 798.

¹⁴¹ *Ibid*, at [26].

¹⁴² *Ibid*, at [44], citing *X & Y v Netherlands* (1985) 8 EHRR 235, *MC v Bulgaria* (2003) 15 BHRC 627, and *Von Hannover v Germany* (2005) 40 EHRR 1.

¹⁴³ *Ibid*, at [45].

¹⁴⁴ [2016] UKSC 28.

rights for tenants had apparently reduced the private rented sector in the United Kingdom to a moribund state. There was very little incentive to become a landlord and make private rented accommodation available as an alternative to owner occupation. A package of legislative measures passed in the 1980s and afterwards, of which section 21(4) of the Housing Act 1988 was part, had been designed to revitalise the private rented sector. If the court were viewed as a public authority for the purposes of Article 8 and the court had to consider the proportionality of granting a possession order this could undermine the purposes of this legislation. In that context the Supreme Court saw the court as “merely the forum for the determination of the civil right in dispute between the parties”¹⁴⁵ and not a public authority obliged to have regard to the tenant’s Article 8 rights.¹⁴⁶ Applying this reasoning to section 36 of the Administration of Justice Act 1970 the conclusion would have to be reached that Article 8 would not apply in that context either, although that says nothing about the argument made previously that Article 6 of the Convention requires occupiers to be given the right to have the question of being evicted from their home determined by a court.

On the face of things this looks very clear and final but one should not forget that everything seemed quite similar before the dialogue between the House of Lords and the Strasbourg court ultimately resulted in the Supreme Court performing a *volte face* in cases where public sector landlords were seeking possession of property.¹⁴⁷ One troubling feature of the judgments of the Supreme Court and Court of Appeal in *McDonald* was the seam of Strasbourg authority which suggests that the court is a public authority for Article 8 purposes. These decisions – *Zehentner v Austria*,¹⁴⁸ *Zrilic v Croatia*,¹⁴⁹ *Brezec v Croatia*,¹⁵⁰ and *Lemo v Croatia*¹⁵¹ – were not followed by the English courts in *McDonald* for a combination of four reasons, not all of which could be described as completely convincing. First, it was pointed out that none of these decisions came from the Grand Chamber, which cannot be regarded as a sufficient reason in itself to dismiss them. Secondly, it was pointed out that neither Austria nor Croatia had taken the point that Article 8 was arguably inapplicable, but one explanation for this may just have been that the point was bad. Thirdly, it was argued that *Zehentner* and *Zrilic* were not concerned with contractual rights subject to statutory restriction. But if *Zehentner* is examined it is very difficult to see why it should call for different treatment from *McDonald*. The applicant had been evicted from her apartment after a judicial sale of the property to enforce a money judgment in respect of plumbing work carried out to the property. The enforcement proceedings were the final stage of a private law action to recover payment for services rendered; they were not public bankruptcy proceedings undertaken for the benefit of the applicant’s general creditors. In *Zrilic* the domestic court exercised its own powers of partition and sale of a residential property in favour of a party who also had Article 8 rights. This would have reduced the extent of the applicant’s Article 8 rights but would not have rendered them inapplicable. In *Brezec* and *Lemo* Article 8 was

¹⁴⁵ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, at para 108 (Lord Millett).

¹⁴⁶ The Supreme Court seems to have been concerned not to open the ‘floodgates’ and open up the entire body of land law to Convention review. See J. Howell, ‘The Human Rights Act 1998: Land, Private Citizens, and the Common Law’ (2007) 123 *LQR* 618; Mark P. Thompson, ‘Possession Actions and Human Rights’ (2011) *Conv* 421.

¹⁴⁷ *Supra* ns 67-72.

¹⁴⁸ (2009) 52 EHRR 22.

¹⁴⁹ Application no. 46726/11, 3 October 2013.

¹⁵⁰ [2014] HLR 3.

¹⁵¹ Application no 3925/10, 10 July 2014.

successfully invoked by a residential tenant against a private sector landlord! However these last two cases may well be distinguishable on the ground that the landlord had been a state-owned company when the tenancies in question were granted. The tenant would have had a strong case that Article 8 rights could not be taken away by a subsequent privatisation of the property. **It is understood that a reference has been made to Strasbourg so the Supreme Court's decision, as in the public sector landlord cases, may not be the last word on this subject.**¹⁵²

In an extremely scholarly article Professor Sarah Nield and Professor Nicholas Hopkins have challenged the compatibility of section 36 of the Administration of Justice Act 1970 with Article 8 and Article 1 of Protocol 1 to ECHR.¹⁵³ Their article lucidly uncovers some of the undoubted limits of section 36. It takes account only of the financial interests of the parties to mortgage transactions, and has a very limited concept of home and all that this involves for homeowners. Unlike other legislative provisions concerned with repossession of land such as section 15 of the Trusts of Land and Appointment of Trustees Act 1996 (enforcement action by trustee of a trust for sale of land) and section 335A of the Insolvency Act 1986 (power of sale of trustee in bankruptcy), does not allow for the interests of third parties (particularly children) to be taken into account. In terms of social policy section 36 may well deserve the authors' damning verdict of "no longer fit for purpose" in its present form.¹⁵⁴ But this article, for all its undoubted merits, fails to make much of a case for why Article 8 actually applies in the context of mortgage repossessions. The authors state:-

" to the extent that a chargee's rights are derived from or controlled by statute, the court is obliged by s 3 of the HRA to interpret that legislation in a human rights compliant manner. Thus, although a private creditor is not under a direct duty to act in a human rights compliant manner, the statutory framework which confers and governs their rights must comply with Convention standards. Furthermore, a court in dealing with a repossession claim is required as a public authority to act in a human rights compliant manner."¹⁵⁵

On the face of it, this simply asserts that a court which confines Article 8 to actions by public authorities would not be interpreting section 36 in a human rights compliant manner.¹⁵⁶ But the article contains little in the way of cogent argument as to why Article 8 does apply in the private law context.

Some reference may be made to commentators' discussion of *McDonald v McDonald* in the Court of Appeal, which came to the same conclusion as the Supreme Court. This was not favourable.¹⁵⁷ The most telling point made in this literature concerned Arden LJ's argument

¹⁵² S. Nield, 'Shutting the door on horizontal effect: *McDonald v McDonald* (2017) *Conv* 60.

¹⁵³ S. Nield and N. Hopkins, 'Human Rights and Mortgage Repossession: Beyond Property Law Using Article 8' (2013) 33 *Legal Studies* 431.

¹⁵⁴ *Ibid*, at 453.

¹⁵⁵ *Ibid*, at 444-45.

¹⁵⁶ Hurford, n. 133 *supra*, at 11-12, does not take the argument any further forward in asserting that some Strasbourg authorities support the application of Article 8 between private parties.

¹⁵⁷ See S. Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) *Conv* 77; E. Lees, 'Horizontal Effect and Article 8: *McDonald v McDonald*' (2015) 131 *LQR* 34; I. Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) *EHRLR* 138.

that all of the European Court of Human Rights' decisions on the applicability of Article 8 to possession proceedings taken by private individuals or bodies assumed but did not decide the issue. As Loveland has pointed out¹⁵⁸ too much should not be read into the fact that the point was never argued. That Article 8.2's reference to *public authority* poses the question of its applicability to private parties seems obvious. Surely if there was any substance to it, the point would have been taken before the European Court of Human Rights and also before the House of Lords in *Ghaidan v Godin-Mendoza*. Perhaps the most likely explanation why it was not taken before either of these judicial bodies or by Professors Nield and Hopkins, is that the point is simply bad.

In terms of this essay's overarching questions regarding the fitness for purpose of section 36 the observation should be made that it seems somewhat unsatisfactory that Article 8 must be taken into consideration in public law repossession proceedings but not in private law. In deciding against Article 8's applicability in private law the Supreme Court was clearly conscious that private landlords and mortgagees have property rights under Article 1 of the First Protocol that would be reduced if the proportionality of evicting an occupier were taken into account. But when the nature of the parties' respective rights and the seriousness of the consequences of losing them are weighed against each other, is there not a strong case for reforming section 36 so that the proportionality of evicting the mortgagor from their home is considered by the court? The mortgagee's property rights are mainly economic in most cases and the court would only refuse a possession order in an exceptional case. The mortgagor stands to lose his or her home, with the not insignificant risk of being made homeless in an age when public sector housing is not in such plentiful supply as it once was. Section 36 should also be reformed along the lines of section 15 of the Trusts of Land and Appointment of Trustees Act 1996 and section 335A of the Insolvency Act 1986 to allow for the interests of third parties (such as children) in their home to be taken into account.

Soft Law Regulation

Since 2000 the 'hard law' regulation of mortgage law and mortgage repossession has been supplemented by some potentially significant soft law regulation. As most mortgage repossession cases settle out of court these soft law provisions have their impact on cases where legal proceedings are not issued as well as on the pre-court stages of cases where proceedings are issued.

The Financial Services and Markets Act 2000 ('FSMA 2000')¹⁵⁹ regulates all mortgage contracts secured by a first legal charge over a borrower's primary or secondary residence entered into from 31st October 2004. A mortgage lender providing such a secured loan must be authorised to do so by the Financial Conduct Authority.¹⁶⁰ FSMA 2000 provides three kinds of regulatory guidance – principles, codes and rules.¹⁶¹ Failure to comply with the principles or the codes may attract sanctions from the regulatory authority, but do not give rise to legal action by the

¹⁵⁸ *Ibid*, at 146.

¹⁵⁹ See P. Kenna and K. Lynch-Shally, *supra* n.74, 302-08, from which this account is mainly derived.

¹⁶⁰ FSMA 2000, section 19. Originally the regulatory body was the Financial Services Authority but a transfer of functions to the new Financial Conduct Authority took place under the Financial Services Act 2012.

¹⁶¹ FSMA 2000, Part 1A, Ch.1, as substituted by the Financial Services Act 2012.

borrower and do not affect the validity of the mortgage contract.¹⁶² If the lender breaches any rules the validity and effectiveness of the mortgage contract is still unaffected,¹⁶³ but the borrower is entitled to pursue an action for breach of statutory duty.¹⁶⁴ However the contract would be prima facie unenforceable where the lender carried on regulated activity without authorisation.¹⁶⁵

The relevant rules in the United Kingdom may be found in the Mortgage and Home Finance: Conduct of Business Sourcebook (MCOB). MCOB chapter 11 places an obligation on lenders to assess the borrower's ability to repay when entering into a regulated mortgage contract, and requires the lender to demonstrate affordability as a pre-requisite to entering into the contract. MCOB chapter 13 requires lenders to deal fairly with borrowers in arrears and in accordance with a written policy consistent with the chapter. Repossession is to be a last resort, to occur only where all other reasonable attempts to resolve the position have failed.¹⁶⁶ Little exists in the way of empirical evidence as to the difference that MCOB chapter 13 has made to mortgage repossession.¹⁶⁷ To the extent that there has been greater forbearance by lenders this may be attributable as much to economic factors such as low interest rates¹⁶⁸ and negative equity.

The other soft law regulation of the mortgage repossession process that requires discussion is the Mortgage Pre-Action Protocol for Possession Claims (MPAP) introduced by the Civil Justice Council in 2009. It applies to first and second charge mortgages over residential property but not to buy-to-let mortgages.¹⁶⁹ The Protocol describes the behaviour the court will normally expect of the parties prior to the start of a possession claim.¹⁷⁰ It does not alter the parties' rights and obligations.¹⁷¹ Paragraph 2.3 stresses the desirability of resolving difficulties without court proceedings, while recognising that an order for possession may be in the interests of both parties in some cases. Paragraph 3 states the aims of the Protocol as being that the parties act fairly and reasonably towards each other in resolving any matter concerning mortgage arrears; and to encourage greater pre-action contact between them in order to seek agreement, and where agreement cannot be reached, to enable efficient use of the court's time and resources. The parties, or their representatives, must discuss with each other the reasons for arrears (for example whether temporary or long-term), the borrower's financial circumstances and proposals for repayment, and whether the borrower may be able

¹⁶² FSMA 2000, sections 64(8) and 66.

¹⁶³ *E.g., Swift 1st Ltd v McCourt* [2012] NICH 33. Contrast the position in the Republic of Ireland where Laffoy J refused repossession of a mortgaged property where the lender had failed to comply with the Code of Conduct on Mortgage Arrears 2013; see *Stepstone Mortgage Funding v Fitzell* [2012] IEHC 142. Hogan J did likewise in *Irish Life and Permanent Plc v Duff* [2013] IEHC 43.

¹⁶⁴ FSMA 2000, section 150. Financial redress may also be sought via a complaint to the Financial Services Ombudsman under Part XVI of FSMA 2000.

¹⁶⁵ FSMA 2000, sections 26(1) and 27(1).

¹⁶⁶ See Kenna and Lynch-Sally, *supra* n. 74, at 309-10.

¹⁶⁷ See Nield, *supra* n. 9, at 620. Compliance was described as variable in 2008 according to the Financial Services Authority, although in 2009 Shelter reported a move away from a 'pay or possess' approach to one of more 'managed forbearance'. See also Whitehouse, *supra* n. 30, at 164-69.

¹⁶⁸ *Supra* n. 24.

¹⁶⁹ Para 4.

¹⁷⁰ Para 2.1.

¹⁷¹ Para 2.2.

to pay the arrears in a reasonable time.¹⁷² The lender must respond promptly to any proposal for payment made by the borrower and, if not agreeable to the proposal, give reasons in writing within 10 business days.¹⁷³ If the borrower fails to comply with an agreement, the lender should give the borrower 15 business days' notice in writing of its intention to commence a possession claim, unless the borrower remedies the breach.¹⁷⁴ A lender must not consider starting a possession claim where the borrower has made any application for financial support from several listed sources; or has an affordability or financial difficulty and requires time to obtain independent debt advice; or a reasonable expectation of an improvement in their financial situation in the near future (for example a new job or income from a lodger).¹⁷⁵ Starting a possession claim is stated to be a last resort, only to be resorted to where all other reasonable attempts to resolve the situation have failed. Alternatives listed include – extension of the term of the mortgage; changing the type of mortgage; deferring interest payments; capitalising arrears.¹⁷⁶ The lender must consider whether to postpone the start of a possession claim where the borrower has made a genuine complaint to the Financial Services Ombudsman about the potential possession claim, and where the lender does not intend to wait on the Ombudsman decision it must give notice to the borrower with reasons.¹⁷⁷

In a detailed critique of MPAP Lisa Whitehouse has pointed out that the current Protocol differs in important respects from the draft Protocol issued the year before.¹⁷⁸ The most important differences appear to be the following:-

1. The draft Protocol prohibited court proceedings while an agreement was in place between lender and borrower and the borrower was keeping to it.¹⁷⁹ The district judge hearing a case brought in defiance of this provision could stay it.¹⁸⁰
2. Compliance with the entire draft Protocol was mandatory. Failure to comply could have resulted in an adjournment with costs awarded against the lender.¹⁸¹
3. The draft Protocol would have extended the district judge's power to deny the lender its costs in possession proceedings where it had failed to treat the borrower in a fair and reasonable manner.¹⁸²

It seems that the changes made to the draft Protocol came largely at the instigation of the Council of Mortgage Lenders (CML) who challenged the right of the Civil Justice Council to change the law by pre-action protocol.¹⁸³ Given the fate of the 1936 Practice Direction and the decision in *Birmingham Citizens Permanent Building Society v Caunt* it is difficult to

¹⁷² Para 5.4.

¹⁷³ Para 5.6.

¹⁷⁴ Para 5.8.

¹⁷⁵ Para 6.1.

¹⁷⁶ Para 7.1.

¹⁷⁷ Para 8.

¹⁷⁸ L. Whitehouse, *supra* n. 79.

¹⁷⁹ *Ibid*, 795-96.

¹⁸⁰ *Ibid*, at 797.

¹⁸¹ *Ibid*, at 798, 801.

¹⁸² *Ibid*, at 810-11. The mortgage contract usually awards the costs of possession proceedings to the lender as a matter of contractual right. District judges do have power to prevent this but rarely exercise it. The draft Protocol would have extended this power.

¹⁸³ *Ibid*, at 798-99.

challenge the accuracy of the CML's argument as a proposition of law, notwithstanding its obviously self-interested origins.¹⁸⁴ The draft Protocol had some meaningful sanctions for non-compliance but now there is only paragraph 2.1's unenforceable statement that the Protocol contains what is *expected* to happen. Judges may adjourn proceedings if the Protocol is not complied with and deny lenders their costs.¹⁸⁵ Recent research has suggested that the Protocol is being applied inconsistently in England and Wales, with some judges scrupulous about implementing it but others ignoring it.¹⁸⁶ The same research, however, pointed out the immense difference it makes for a borrower if he or she turns up at the repossession hearing. Put simply there is little or nothing the judge can do for the borrower if not present and a surprising amount if actually there.¹⁸⁷

Sale by Mortgagor

In most section 36 cases the borrower is seeking a suspension of the possession order so as to prevent the mortgaged property from being sold and he or she evicted. If a possession order is granted and the property is sold the sale would usually be carried out by the mortgagee. But there have been cases where the mortgagor applied for a section 36 stay to enable the mortgagor to sell the property. The advantages of allowing the mortgagor to carry out the sale are that the mortgagor may be able to obtain a higher price than the mortgagee. If the mortgagee gets enough to pay off its security it will be content.¹⁸⁸ It has little incentive to try and obtain a higher price because any balance over and above the outstanding mortgage sum would go to the mortgagor.¹⁸⁹ The danger, however, with allowing the mortgagor carriage of the sale is that he or she may procrastinate through reluctance to leave their home.¹⁹⁰

The juridical basis of the power to suspend or stay a possession order to facilitate a sale by the mortgagor is important. In *Royal Trust Co of Canada v Markham* Sir John Pennycuik likened this power to the one recognised by Russell J in *Birmingham Citizens Permanent Building Society v Caunt*.¹⁹¹ This is only a short adjournment to enable the mortgagor to arrange a sale of the property to pay off the entire mortgage debt. However to enable the mortgagor to get the best price possible a longer adjournment may be needed and it does seem that section 36 would allow for this. Section 36(1) allows the court to exercise any of its section 36(2) powers "if it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default" under the mortgage. The words "pay any sums due" and "remedy a default" are wide enough

¹⁸⁴ See ns 32-34 and text.

¹⁸⁵ See n. 174 *supra*.

¹⁸⁶ S. Bright and L. Whitehouse, 'Information, Advice and Representation in Housing Possession Cases' (Oxford/Hull, 2014), referred to in *Housing Repossessions Taskforce Final Report*, *supra* n. 8, at para 54.

¹⁸⁷ *Ibid*, para 55.

¹⁸⁸ The risk of a mortgagee sale at a distressed price was acknowledged by Neill LJ in *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630, at 639.

¹⁸⁹ Note, however, that the mortgagee is obliged to seek the best price reasonably obtainable, *supra* n. 7. In the Republic of Ireland there is a statutory duty to like effect under section 103 of the Land and Conveyancing Law Reform Act 2009; see Kenna and Lynch-Shally, *supra* n. 74, at 298.

¹⁹⁰ *Cheltenham and Gloucester Building Society v Krausz* [1997] 1 All ER 21, at 27 (Phillips LJ).

¹⁹¹ [1975] 1 WLR 1416, at 1420, referring to [1962] 1 Ch 883.

to encompass cases where the mortgagor pays off the entire outstanding amount, and the “reasonable period” is surely longer than the *Birmingham v Caunt* period as otherwise there would have been little point in enacting a power to postpone sale.

The case law on this aspect of section 36 attempts to maintain a balance between the legitimate desire of the borrower to obtain the best price possible for the property and the lender’s wish to enforce its security. Relevant considerations are the likelihood of a sale, the probable price obtained, and the length of time a sale is likely to take. In the first reported case to consider this question, *Royal Trust Co of Canada v Markham*,¹⁹² where a stay was refused for want of evidence supporting a sale, the Court of Appeal indicated that a time frame must be specified for the sale, and Browne LJ said that there must be clear evidence that the sale would take place in the near future and that the price obtained would cover all sums due under the mortgage.¹⁹³ In *Halifax Plc v Blay*¹⁹⁴ a possession order was suspended for eight weeks because the mortgagor had received an offer for the property that exceeded the amount owed. In *National and Provincial Building Society v Lloyd*¹⁹⁵ the Court of Appeal stated that there was no inflexible rule that said the sale had to be in the near future but no stay was allowed in that case because there was insufficient evidence of likely sale at any time. As noted above it would appear to be correct to state that a section 36 stay does not have to be short because nothing would have been added to the existing power were this to be the case. A stay was refused in *Mortgage Service Funding Plc v Steele*¹⁹⁶ because the evidence supporting sale by the borrower was flimsy. Nourse LJ described the general approach of the court as follows:-

“If the property has to be sold, it can just as well be sold by the mortgagee, whose duty is always to obtain the best price reasonably at the date of sale. If there is a potential purchaser at hand, then all the mortgagor has to do is put the mortgagee in touch with him and the matter can proceed from there. Unless there is firm evidence that a sale is about to be completed, it is not the practice of the court to prevent the mortgagee from enforcing his remedy of obtaining possession and exercising his own power of sale over the property.”¹⁹⁷

The high water mark (at least so far) of mortgagor sales in England and Wales came in *Target Homes Ltd v Clothier*.¹⁹⁸ Here the Court of Appeal granted a three month adjournment to allow the mortgagor to find a buyer. The only evidence supporting a sale at any time for a sufficient price to pay off the mortgage came from the mortgagor’s estate agents who expressed ‘optimism’ that a sale at sufficient price would take place soon. In *Bristol and West Building Society v Ellis*¹⁹⁹ Auld LJ said that estate agents’ estimates should be treated with reserve²⁰⁰ although the circumstances of that case were very different from *Clothier*. The mortgagor was seeking a 3-5 year adjournment until her children had finished university and

¹⁹² [1975] 1 WLR 1416.

¹⁹³ *Ibid*, at 1423. Mervyn Davies J endorsed this view in *Citibank Trust Ltd v Ayivor* [1987] 1 WLR 1157, at 1163.

¹⁹⁴ [1999] 77 P & CR D37.

¹⁹⁵ [1996] 1 All ER 630.

¹⁹⁶ (1996) 72 P & CR D40.

¹⁹⁷ *Ibid*, at D41.

¹⁹⁸ [1994] 1 All ER 439.

¹⁹⁹ (1997) 29 HLR 282.

²⁰⁰ *Ibid*, at 288.

there was insufficient evidence that the property would remain good security for the loan over that time.²⁰¹

Three somewhat unusual cases are worthy of brief mention. In *Cheltenham and Gloucester Plc v Krausz*²⁰² the mortgagors sought a suspension of the possession order so that they could bring an application to the High Court for an order under section 91(2) of the Law of Property Act 1925. This provision allows any person interested in the mortgage money or the right of redemption to ask the court to direct a sale of the mortgaged property. The mortgagors wanted the court to direct a sale to a charitable trust that bought properties from occupiers facing repossession and then let the property to those occupiers. The Court of Appeal refused the mortgagors' application because the price to be paid by the trust was insufficient to discharge the mortgage debt and the mortgagors had no other funds to make up the shortfall. Martin Dixon has explained that section 91(2) is particularly useful in negative equity situations like *Krausz* where section 36 is frequently unhelpful because the lender's security is at risk. Dixon supported allowing sales under section 91(2) over the head of a mortgagee's objection because this was frequently the best realistic option.²⁰³ In the context of today's negative equity problem this approach might be particularly useful.

In *Cheltenham and Gloucester Plc v Booker*²⁰⁴ the Court of Appeal recognised that a possession order could be stayed under the inherent jurisdiction principle of *Birmingham Citizens Permanent Building Society v Caunt* to facilitate a sale by the mortgagee with the mortgagor still occupying the property.²⁰⁵ As Dixon has written:-

"This unusual order appears to have been motivated by a desire to maximise the sale price by generating the illusion that there was no repossession sale and to provide a roof for the mortgagors pending sale."²⁰⁶

The following conditions were laid down for the making of such an order:-

- (1) Possession would not be required by the mortgagee pending completion of the sale but only by the purchasers on completion;
- (2) The presence of the mortgagor pending completion would enhance, or at least not depress, the purchase price;
- (3) The mortgagor would co-operate in effecting the sale, by *e.g.* showing prospective purchasers around;
- (4) The mortgagor would give possession to the purchaser on completion.

²⁰¹ Commenting on this decision Nield and Hopkins, *supra* n. 153, at 452-53, have expressed doubt whether treating such family considerations as irrelevant would be Article 8 compatible, although they did not suggest that the adjournment sought in that case should have been granted. This, however, assumes that Article 8 is applicable in this context.

²⁰² [1997] 1 All ER 21.

²⁰³ M. Dixon, 'Combating the Mortgagee's Right to Possession: New Hope for the Mortgagor in Chains' (1998) 18 *Legal Studies* 279.

²⁰⁴ (1997) 29 HLR 634.

²⁰⁵ It is difficult to see why this could not have been done under section 36 but the outcome is the same either way.

²⁰⁶ Dixon, *supra* n. 203, at 289.

It was thought that it would seldom be appropriate to exercise this power, and difficult to imagine circumstances where it would be appropriate to do so if the mortgagee did not consent. It was not exercised in that case as there had been a long history of obstruction by the mortgagor. Millett LJ pointed out the potential disadvantages of making an order of this kind.²⁰⁷ The mortgagee is contractually obliged to give vacant possession on sale and would be in breach if the mortgagor remained in possession after the sale. If the mortgagor were showing a prospective purchaser around the property the latter would become aware that the mortgagee did not have vacant possession and may be deterred from proceeding with the purchase. But if it seemed that these problems were modest in extent, the mortgagor could not pay the mortgage, but the property would realise sufficient to pay it off, then there seems no objection in principle to this kind of order.

The third unusual case was *Barclays Bank Plc v Alcorn*.²⁰⁸ Here the mortgaged land contained a main dwelling house and a cottage. Mrs Alcorn (co-mortgagor with her husband) proposed that only the main dwelling house be sold and she be allowed to continue to reside in the cottage. Hart J rejected this for three reasons. First, although the sale of the main dwelling house tomorrow would realise enough to pay off the mortgage, that property could not be sold tomorrow. By the time it could realistically be sold interest would have pushed the sum owing beyond the value of the property. Secondly, there were various practical difficulties concerning confusion as to vacant possession, boundary disputes, and cross easements on the separation of the two properties. Thirdly, if Mrs Alcorn were to sell the house the co-operation of her husband's trustee-in-bankruptcy would be needed. This decision does not completely close the door on sales of part of the property but at the very least there would seem to be a need for certainty that the mortgage debt will definitely be cleared.

As Lara McMurry has observed²⁰⁹ the approach of the English courts to sales of the mortgaged property has been restrained and favourable to the lender. Mortgagor sales have been allowed but firm evidence that a sale was going to take place in the near future for a price sufficient to pay off the security was realistically what the borrower needed in order to convince the court that the lender should not have carriage of the sale. However, the courts' approach to this matter has been markedly more liberal in Northern Ireland. In *Northern Bank Ltd v Jeffers* Girvan J said this about the relevant matters to consider here:-

"The court will have to take into account all the relevant circumstances which may include the court's view of the genuineness of the proposal to sell, the steps taken to enable the sale to be effected, the likely value of the property if sold by the mortgagors as compared to the value if sold by the mortgagee, the conduct of the mortgagor in the past, at the time of the making of the order and since the making of the order and the increase or decrease of the mortgage debt since the making of the order."²¹⁰

In *Northern Bank Ltd v Mallett* ²¹¹ the bank obtained judgment against the defendants. On 20th December 2000 the Master made an order that the defendants deliver up possession of

²⁰⁷ *Supra* n. 204, at 638.

²⁰⁸ [2002] EWHC (Ch) 468; [2002] 2 P & CR DG10 (Hart J). Leave to appeal refused 17 May 2002.

²⁰⁹ L. McMurry, 'The Section 36 Discretion: Policy and Practicality' (2002) *Conv* 594.

²¹⁰ [1996] NI 497.

²¹¹ [2001] NICH 7.

the property within 28 days, the order not to be enforced before 1st May 2001 without the leave of the court while the defendants made all reasonable endeavours to redeem the mortgage, keeping the bank's solicitors informed on demand of material developments. The bank challenged the terms of the stay as too vague, maintaining that there was no evidence about asking price, the value of the premises, the marketability of the property or the likely timescale of the sale. The defendants responded that there was an offer of £133,000 on the property against an asking price of £135,000; they were minded to accept the offer which was sufficient to pay off the mortgage. Girvan J referred to the matters that the mortgagor should put before the court in *Jeffers* above and elaborated to the effect that these should include a letter from a reputable estate agent establishing that the premises are on the market, what the asking price is, whether that price is realistic in light of comparable prices in the area, the perceived ease or difficulty of the sale, whether offers have been received, and the likely timescale of the sale. If the mortgagor has not put the property on the market the court might grant a short adjournment to enable the mortgagor to adduce such material. Here the £133,000 offer was sufficient to support an adjournment to 1st May 2001. If the court is satisfied of the matters specified it should stay enforcement until a specified date, reserving the right to remove the stay if the lender produces evidence that the defendant is not genuinely marketing the property, and also reserving the right to extend the stay if it appears that the property is going to be sold at a specified later date.

It does not appear that this more relaxed approach in Northern Ireland has been due to any particular circumstances prevailing in that jurisdiction or that it contributed to procrastination on the part of borrowers unwilling to proceed with sales because they were reluctant to leave their homes. Given the probability of sale at a higher price if the mortgagor undertakes it the Northern Ireland experience offers reasonable ground for taking a more liberal approach in England and Wales.

With this in mind it would be instructive to look at what MCOB chapter 13 and the MPAP had to say on this question. MCOB provides that when dealing with a borrower in payment difficulties a lender must make reasonable efforts to reach an agreement with a borrower on a payment arrangement, and if this cannot be done then allow the borrower to remain in possession for a reasonable period to effect a sale.²¹² In MPAP paragraph 6 (postponing the start of a possession claim) it is specified that if the borrower can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, the lender must consider postponing starting a possession claim to allow the borrower a realistic period of time to sell the property. Where the lender agrees to postpone starting a possession claim the borrower must continue to take all reasonable steps actively to market the property.²¹³ This clearly favours the Northern Ireland approach but the lender's obligation is only to consider not starting a possession claim, not actually to postpone it. As Whitehouse pointed out the draft Protocol specified that proceedings should not be initiated where the borrower could demonstrate that he or she had taken all reasonable steps to market the property.²¹⁴ Where the lender agrees to postpone starting a possession claim the borrower should provide the lender with

²¹² MCOB 13.3.2A(5).

²¹³ MPAP, para 6.2.

²¹⁴ Whitehouse, *supra* n. 79, at 807. The change seems to have owed much to the CML's protest that the draft Protocol was "a charter for 'won't pays'".

a copy of the particulars of sale, the Energy Performance Certificate ('EPC') or proof that an EPC has been commissioned and (where relevant) details of any purchase offers received within a reasonable period of time specified by the lender. The borrower should give the lender details of the estate agent and the conveyancer instructed to deal with the sale. The borrower should also authorise the estate agent and the conveyancer to communicate with the lender about the progress of the sale and the borrower's conduct during the process.²¹⁵

Conclusion

Recent developments in the housing market make this a very good time to look again at the discretion conferred on courts in mortgagee repossession cases to adjourn proceedings to give the borrower time either to remedy his or her default under the mortgage contract or to arrange for a sale of the property at a price sufficient to pay off the mortgage debt. This conclusion revisits the overarching question posed in the introduction of whether section 36 is any longer fit for purpose and, if it is not, what a new legislative provision should contain to give borrowers the protection against repossession that they should have. That overarching question contained three sub-questions, to which answers are provided below.

In relation to the first question, whether the lender needs to get a court order to enforce its security and recover possession of the property, it was shown that the lender does have to show default by the borrower in paying the mortgage. This allows the lender to sell the property but without getting vacant possession the property would probably realise a significantly reduced price. This means that lenders usually do seek an order for possession so that borrowers usually will get the chance to ask the court to exercise the section 36 powers in their favour. However in this day and age it cannot be considered satisfactory that a lender could even in theory sell the borrower's home without the borrower having any chance of asking the court to intervene and give the borrower a chance to rectify the situation. Regardless of the question whether Article 6 of the ECHR is engaged in mortgagee repossession proceedings it sets a benchmark that domestic law should comply with. The borrower's rights to his or her home should thus be determined by a court. A new legislative provision should specify this and should also clarify that its ambit is in relation to genuine residential mortgages and not mortgages of dwelling houses. It may also be noted again that there are legislative provisions in Northern Ireland, Schedule 7, Part 1, paragraph 5(1)-(3) of the Land Registration Act (NI) 1970, which provide a useful precedent for a legislative provision of this kind.

In relation to the second question the position should be that the 'reasonable period' within which the borrower has to show an ability to clear arrears and get back on track in terms of paying off the mortgage must be at least the remaining term of the mortgage. Consistently with the soft law provisions discussed above an extension of the mortgage period should not be ruled out so long as this does not place the lender's security at risk. There should not be a presumption in favour of 'remaining term' being the 'reasonable period' in any particular case. 'Remaining term' and possibly an extension on this are the maximum periods within which rescheduling should operate but the time in any particular case should be set in relation

²¹⁵ *Ibid*, para 6.3.

to the facts of that case, taking account of the legitimate interests of both parties. It is legitimate to take account of any risks to the lender's security in making rescheduling decisions but not where this risk is due to negative equity or irresponsible lending. The only relevant consideration in those cases is whether the borrower has a viable plan to get paying the mortgage back on track. A new statutory provision framing the court's discretion in those terms would be useful and would provide a framework for the soft law provisions that are likely to govern the vast majority of mortgage default cases.

New legislation is required to provide that when the court is called upon to decide whether a lender should be granted a possession order the borrower's Article 8 rights are to be taken into account. The court should be able to say that although the lender has shown that all legal requirements are satisfied in terms of recovering possession, nonetheless a possession order is disproportionate in the circumstances. This is the position in public law and, notwithstanding the lender's private property rights, it would be better were it the position in private law too. When enacting a new legislative provision to ensure that the borrower's Article 8 rights are taken into account, the opportunity should also be taken to ensure that the rights of third parties (such as children) in their home are taken into consideration as is currently the case under section 15 of the Trusts of Land and Appointment of Trustees Act 1996 and section 335A of the Insolvency Act 1986.

The third question is concerned with the hard decision of selling the property either because there is sadly no alternative or the borrower does not want to struggle on any longer. Under the current law borrowers may be allowed to sell the property themselves if it seems that a higher price would likely be obtained. The court needs to be careful of home owners procrastinating over the sale through a wish to remain in their home. But a more relaxed approach to borrower sales has been taken in Northern Ireland and it does not seem that this has resulted in serious problems for lenders. MCOB and MPAP also endorse this approach. Section 36, which confers the power to postpone sale for longer than the short period anticipated in *Birmingham Citizens Permanent Building Society v Caunt*, is social legislation designed to enable ordinary people to become home owners where this is reasonably possible. Contracts that extend over a couple of decades or more are not always going to run according to plan. This is the relevant context in which to view those sad cases where the joint venture of borrower becoming a home owner and lender profiting from assisting the borrower to do so comes to an end and there is no other option but to cut the losses and move on. Even though statutory reform may be unnecessary on this question it is needed for others. It provides a good opportunity for statutory clarification of the law in the manner indicated above.

The world of house purchase is a very different one today from that of 1970 when section 36 was enacted. In those days people borrowed (and were only allowed to borrow) what they could afford to repay for the essential purpose of buying a home. House prices rose much slower than they have risen in more recent times and housing market crashes were largely an unknown phenomenon. There was a much more plentiful supply of social housing for people made homeless by difficulties in paying their mortgage. In more recent times people have entered into (and were allowed to enter into) highly geared loans for a mixture of reasons. There has been a significant 'boom and bust' cycle in the housing market, negative equity has caused problems for both lenders and borrowers even where a borrower who gets into

difficulties manages to work their way out of them, and Right to Buy schemes have depleted stocks of social housing. Additionally the Human Rights Act 1998 has presented doctrinal challenges for section 36. Home ownership appears to be falling²¹⁶ but this may be more due to affordability issues rather than anything that mitigates the challenges of today. This essay has attempted to show how section 36 is struggling to cope with the challenges of today and should be replaced by new legislation drafted with today's circumstances more clearly in mind.

²¹⁶ *Daily Telegraph*, 12th May 2015, quoting statistics supplied by the Office for National Statistics indicating a fall from 69% of United Kingdom homes in 2001 to 64% recently.